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Congress Giveth, and the Courts Taketh Away: Is Restitutionary Recoupment of Federal Funds a Proper Remedy When Taxpayers Allege that an Expired Statute Violated the Establishment Clause?

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I. INTRODUCTION

Imagine that you are a law student, scrimping and saving pennies so you can afford to eat top ramen because it is nearing the end of the semester and you realize that your student loans did not last as long as you had hoped. One afternoon, an email from the law school career center catches your eye: the school is offering to give a $500 grant to any students who will work eight hours a week at the downtown legal aid clinic for the rest of the semester. You jump at this opportunity and spend the rest of your free time giving back to the community, relieved that you didn't have to get a job at the local Burger King to cover your living expenses. By Christmas time, you even have some money left over to buy Christmas presents for your family.

After winter break, however, you get a call from Jane, a top student in your class, informing you that you will have to give the $500 back to the law school. Jane had been reading the school's bylaws during the break and found a provision suggesting that the law school is prohibited from giving grants to students who are not in the top ten percent of the class. She has filed a lawsuit, claiming that she is harmed because there is now $500 less in the school's grant fund which should remain available to her and the other

students in the top ten percent.[1] You are devastated at the prospect of reimbursing the school; the money has all been spent, and you realize you might have to drop out of law school and get that job at Burger King in order to pay the school back for its own error.

Luckily, you, Jane, and the law school deans attend mediation, and you convince them that it would be unfair and unjust for you to pay the school $500 (that you don't have) when you have done nothing wrong. You even spent eighty hours at the legal aid clinic, which would have been spent earning income elsewhere if you had known you wouldn't be paid for your services. Jane and the deans reach an agreement whereby the school promises to be more careful in its administration of grants in the future. After all, it is very important for the school to follow its own rules. Everyone is satisfied, and you are relieved that you can now stay in law school and continue on toward your grand goals of saving the world.

Unfortunately, the Seventh Circuit has never heard this story; it recently held in *Laskowski v. Spellings*[2] that grantees of government funding can be forced by taxpayers to give grant money back to the federal government when the grant has allegedly violated the Establishment Clause—even when the grant statute expired years ago, the funds have long since been spent, and the government does not want the money back.[3] The Seventh Circuit's

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1. You wonder how it came about that Jane is now the enforcer of the school's rules. But because Jane has paid tuition to attend the school, and part of that tuition goes to the grant fund, she claims that she has a right to monitor the school's use of the funds.

2. 443 F.3d 930 (7th Cir. 2006); *vacated and remanded sub nom.* Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007). On June 25, 2007, the Supreme Court decided *Hein v. Freedom from Religion Foundation, Inc.*, 127 S. Ct. 2553 (2007), the Court's most recent case explaining the doctrine of taxpayer standing. *See infra* Part II.A.4. Four days later, the Court granted certiorari in *Laskowski*, vacating the Seventh Circuit's holding and remanding the case for further reconsideration in light of *Hein*. *See Notre Dame*, 127 S. Ct. at 3051. The Seventh Circuit will now have an opportunity to re-decide *Laskowski*. *See id.*

3. *Laskowski*, 443 F.3d at 934. In *Laskowski*, the University of Notre Dame, a Catholic university, instituted a program which trained university students to become future teachers in Catholic schools. *Id.* at 933. Notre Dame sought to replicate this program on other private university campuses, and received a congressional appropriation—disbursed by the Department of Education—to fund this venture. *See* Laskowski v. Spellings, No. 1:03-CV-1810 LJM-WTL, 2005 WL 1140694, at *1 (S.D. Ind. May 13, 2005), *vacated and remanded*, 443 F.3d 930 (2006), *vacated and remanded sub nom.* Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007). Near the end of the third year of the four-year grant period, taxpayer plaintiffs filed suit, claiming that the grant violated the Establishment Clause. *Id.* However, before the case went to trial the grant period expired, and all the funds had been either spent by Notre Dame or disbursed to other universities. *Id.* Although the district court held that this mooted the case, the Seventh Circuit reversed, holding that although the plaintiffs' claim for injunctive relief was moot, they could still assert a claim against Notre Dame for recoupment of the grant funds to the Federal Treasury. *See Laskowski*, 443 F.3d at 933-34. According to the Seventh Circuit opinion, such a remedy is "like a case of money received

remarkable holding in *Laskowski* has already spread to a neighboring circuit: a district court within the Eighth Circuit applied the remedy against a nonprofit organization in a recent case.[4]

Laskowski's new remedy has the potential to widely impact Establishment Clause jurisprudence, especially in the areas of government funding for sectarian schools and other religiously-affiliated groups. Faith-based organizations ("FBOs")[5] are frequent grantees of federal funds because of the indispensable non-religious services they are able to provide in our communities.[6] In 2001 President George W. Bush issued an executive order establishing the White House Office of Faith-Based and Community Initiatives ("FBCI")—a program designed to strengthen the FBOs' abilities to meet social needs through government funding.[7] The

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by mistake and ordered to be returned to the rightful owner"—hence the hypothetical law school story above. *See id.* at 934-35.

4. *See* Ams. United for Separation of Church & State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862, 941 (S.D. Iowa 2006), *judgment aff'd in part and rev'd in part*, 509 F.3d 406 (8th Cir. 2007).

5. FBOs include "a wide array of organizations ranging from individual congregations to faith-affiliated nonprofit service organizations, such as Catholic Charities, Lutheran Social Services, the Salvation Army, as well as faith-affiliated hospitals and nursing homes." COURTNEY BURKE ET AL., ROCKEFELLER INSTITUTE OF GOVERNMENT, FUNDING FAITH-BASED SOCIAL SERVICES IN A TIME OF FISCAL PRESSURE 1 n.1 (2004), *available at* http://www.religionandsocialpolicy.org/docs/research/10-26-02_Funding_FB_SSFiscalPressures.pdf.

6. The Roundtable on Religion and Social Welfare Policy, an independent research project of the Rockefeller Institute of Government, has published case studies comparing faith-based and secular community programs. It was noted that "[t]o many scholars and policymakers, faith-based agencies offer the prospect of greater effectiveness, efficiency, and responsiveness in the provision of social and health services." *See* STEVEN RATHGEB SMITH, ROCKEFELLER INSTITUTE OF GOVERNMENT, *Comparative Case Studies of Faith-Based and Secular Service Agencies: An Overview and Synthesis of Key Findings*, *in* COMPARATIVE VIEWS ON THE ROLE AND EFFECT OF FAITH IN SOCIAL SERVICES 1, *available at* http://www.religionandsocialpolicy.org/docs/research/comparative-case-study-web.pdf; *see also* THE WHITE HOUSE, UNLEVEL PLAYING FIELD: BARRIERS TO PARTICIPATION BY FAITH-BASED AND COMMUNITY ORGANIZATIONS IN FEDERAL SOCIAL SERVICE PROGRAMS 3 (Aug. 2001), *available at* http://www.whitehouse.gov/news/releases/2001/08/20010816-3-report.pdf ("Although little attention has been paid to them until fairly recently, faith-based grassroots groups play large and vital roles everywhere . . . . 'These religious organizations represent a major part of the American welfare system.'").

7. *See Hein*, 127 S. Ct. at 2559 (plurality opinion); Exec. Order No. 13198, 66 Fed. Reg. 8497 (Jan. 29, 2001); Exec. Order No. 13199, 66 Fed. Reg. 8499 (Jan. 29, 2001). Governmental monetary support of FBOs is not a new phenomenon. *See* ANNE FARRIS ET AL., ROCKEFELLER INSTITUTE OF GOVERNMENT, THE EXPANDING ADMINISTRATIVE PRESIDENCY: GEORGE W. BUSH AND THE FAITH-BASED INITIATIVE 1 (Aug. 2004), *available at* http://www.religionandsocialpolicy.org/homepage/FB_Administrative_Presidency_Report_10_08_04.pdf ("Government partnerships with religious groups have a long history in America. Faith-based organizations have received federal funds for generations – either directly from federal agencies or funneled through state government – to provide an array of social services."). Indeed, the FBCI predates Bush's presidency, and was actually "the brainchild of a neo-conservative movement of academics, religious leaders, and elected officials in the 1970s and 1980s who sought to redefine the roles of government and civil society to stem what they have described as the ill effects of a social and moral crisis in the nation." *Id.* at 3. While supporters of Bush's FBCI argue "that FBOs deserve greater public support and a more prominent

ready availability of a recoupment remedy could have far-reaching and detrimental effects on the cooperative relationship between government agencies and FBOs to provide these services to the needy.

Whether the recoupment remedy is appropriate is not an easy question to answer. The values protected by the Establishment Clause[8] have been recognized as fundamental since this country's founding.[9] On the other hand, the Constitution has framed our system of government so that each of the three branches of the federal government, including the Judiciary, has limited powers and must stay within the boundaries set by the Constitution.[10] This article will show that the restitutionary recoupment remedy allowed by the Seventh Circuit arguably violates Article III's limits concerning mootness[11] and standing,[12] as well as general separation of

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overall role in service delivery due to their greater effectiveness compared with secular organizations," critics note the lack of definitive research on this subject. *See* SMITH, *supra* note 6, at 17.

8. The First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. The Supreme Court has interpreted the Establishment Clause to mean, at a minimum:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion.

Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

9. For example, the Supreme Court has "discerned in the history of the Establishment Clause 'the specific evils feared by [its drafters] that the taxing and spending power would be used to favor one religion over another or to support religion in general.'" DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854, 1865 (2006) (alteration in original) (quoting Flast v. Cohen, 392 U.S. 83, 103 (1968)). For a discussion of the historical context of the Establishment Clause, see James A. Campbell, Newdow *Calls for a New Day in Establishment Clause Jurisprudence: Justice Thomas's "Actual Legal Coercion" Standard Provides the Necessary Renovation*, 39 AKRON L. REV. 541, 545-48 (2006).

10. Article III of the Constitution specifically limits the jurisdiction of the Federal Judiciary to "cases" and "controversies." U.S. CONST. art. III, § 2, cl. 1. The Supreme Court has repeatedly emphasized the importance of this limitation. *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 476 (1982) ("Article III . . . is not merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a lawsuit which a party desires to have adjudicated; it is a part of the basic charter promulgated by the Framers of the Constitution at Philadelphia in 1787, a charter which created a general government . . . ."). The Supreme Court recently re-emphasized that the doctrine of standing is an essential part of ensuring that the Court stays within the bounds of Article III, noting that "'[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *Cuno*, 126 S. Ct. at 1861 (alteration in original) (quoting Raines v. Byrd, 521 U.S. 811, 818 (1997)).

11. *See infra* Part V.C.

12. *See infra* Part V.D.

powers principles.[13] Although it is important for constitutional provisions to be obeyed by the Legislative and Executive branches, it is not right for the courts to *also* violate the Constitution's mandates in order to police the other branches' every move.[14]

The Supreme Court has made it clear that "[i]f a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so."[15] That principle is especially relevant here, where allowing the courts to order charitable organizations to repay grant funds to the Federal Treasury provides only a negligible or nonexistent gain to the plaintiff taxpayers,[16] but may bankrupt the organizations that have spent the funds in providing services of benefit to the community. This "equitable" restitutionary remedy is anything but equitable, and there is a better way to ensure that the Constitution's safeguards are obeyed.

This article will begin with an examination of the Supreme Court's precedent regarding standing and mootness, as well as the history of restitution in the Establishment Clause context.[17] Next, the article will explain the circumstances surrounding *Laskowski v. Spellings* and address the holdings of both the district court and the Seventh Circuit.[18] The next section will explore the developments that have unfolded following the *Laskowski* holding.[19] Finally, in determining whether recoupment is a proper remedy in this context, this article will examine mootness, standing, and restitution separately and explain why the remedy is contrary to precedent in each of those areas of the law.[20]

II. BACKGROUND

A. The Issue of Standing: Are the Proper Parties Before the Court?

The doctrines of standing and mootness stem from Article III of the Constitution, which requires that the judicial power of the federal court system extends only to "cases" and "controversies."[21] "[T]he standing

13. *See infra* Part V.H.

14. *See Valley Forge*, 454 U.S. at 482–83 ("This Court repeatedly has rejected claims of standing predicated on 'the right, possessed by every citizen, to require that the Government be administered according to law . . . .'" (quoting Fairchild v. Hughes, 258 U.S. 126, 129 (1922))).

15. *Cuno*, 126 S. Ct. at 1860-61.

16. The Supreme Court has held that taxpayers do not have a legally cognizable interest in the Federal Treasury. *See, e.g.*, Frothingham v. Mellon, 262 U.S. 447, 487 (1923); *Valley Forge*, 454 U.S. at 477-78.

17. *See infra* Part II.A–C.

18. *See infra* Part III.A–C.

19. *See infra* Part IV.

20. *See infra* Part V.

21. *See supra* note 10. These words "limit the business of federal courts to questions presented

inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the *particular plaintiff* is entitled to an adjudication of the *particular claims* asserted."[22] To satisfy Article III standing, at a minimum:

> [T]he party who invokes the court's authority . . . [must] show [1] "that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant" . . . [2] that the injury "fairly can be traced to the challenged action" and [3] [the injury] "is likely to be redressed by a favorable decision."[23]

The threshold question in determining standing is "whether the party invoking federal court jurisdiction has 'a personal stake in the outcome of the controversy.'"[24]

1. Taxpayer Standing is Born: *Flast v. Cohen*

In *Frothingham v. Mellon*[25] the Supreme Court held that federal taxpayers do not have standing by their taxpayer status alone to challenge the constitutionality of federal statutes.[26] A narrow exception to this

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in an adversary context and in a form historically viewed as capable of resolution through the judicial process," and "define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government." Flast v. Cohen, 392 U.S. 83, 95 (1968). "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854, 1860-61 (2006). The "case or controversy" requirement:

> [E]nsures that the resources of the federal judiciary are not expended on advisory opinions and hypothetical disputes. "Concepts such as standing, mootness[,] and ripeness assure that cases will be litigated by those having an actual stake in the outcome and that decisions will be made in an arena of real and substantial problems to be redressed by specific solutions."

Wis. Right to Life, Inc. v. Schober, 366 F.3d 485, 488-89 (7th Cir. 2004) (alteration in original) (quoting Jorman v. Veterans Admin., 830 F.2d 1420, 1424 (7th Cir. 1987)).

22. Allen v. Wright, 468 U.S. 737, 752 (1984) (emphasis added).

23. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982) (citations omitted); *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* at 561.

24. *Flast*, 392 U.S. at 101 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

25. 262 U.S. 447 (1923).

26. *See id.* at 486-87. In *Frothingham*, a federal taxpayer sued the Secretary of the Treasury to enjoin the Maternity Act of 1921. *See id.* at 479. The plaintiff claimed that the congressional appropriations invaded into an area of law which was not national, but was reserved to the states, and thus the law was "an effective means of inducing the states to yield a portion of their sovereign rights," in violation of the Constitution. *Id.* The plaintiff alleged injury in that the appropriations

"impenetrable barrier" to taxpayer standing suits, however, was crafted in *Flast v. Cohen*.[27] In *Flast*, taxpayers sued to enjoin the expenditure of federal funds on textbooks and instruction in religious schools, allegedly in contravention of the First Amendment's Establishment and Free Exercise Clauses.[28] The Court ruled that *Frothingham* did not completely bar all suits by federal taxpayers challenging federal expenditures because it is possible for some such plaintiffs to have a sufficient personal stake in the outcome of the litigation to satisfy standing analysis.[29]

The *Flast* Court ruled that in order for plaintiffs to have standing based only on their status as taxpayers, the plaintiffs must satisfy a two-pronged "nexus" test.[30] To meet the "nexus" test: (1) the plaintiffs must challenge the constitutionality of a congressional act under the Taxing and Spending Clause of Article I, Section 8 of the Constitution;[31] and (2) the challenged act must violate a specific constitutional limitation on Congress's taxing and spending power.[32] The Court held that because the Establishment Clause is

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would increase the burden of future taxation, effectively taking her property without due process of law. *See id.* at 486. The Court held that the plaintiff did not have standing to challenge the Act as unconstitutional based merely on her status as a federal taxpayer. *See id.* at 487. The Court gave four main reasons for its holding: (1) a taxpayer's "interest in the moneys of the treasury . . . is shared with millions of others, [and] is comparatively minute and indeterminable"; (2) the effect of payments from the Treasury on future taxation is "remote, fluctuating and uncertain"; (3) if standing was allowed here, taxpayers would challenge "every other appropriation act and statute whose administration requires the outlay of public money," creating an inconvenience to the court system; and (4) to declare an Act of Congress unconstitutional when there is no judicial controversy would violate separation of powers. *Id.* at 487-89. The Court emphasized that even if an act is unconstitutional, the plaintiff challenging that act must be able to show "that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Id.* at 488.

27. *See Flast*, 392 U.S. at 85. Since *Flast*, the Court has adhered to the narrow confines of this exception to *Frothingham*, and has refused to expand the exception beyond the circumstances of the *Flast* case. *See* Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2568-69 (2007); *see also* DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854, 1865 (2006); Bowen v. Kendrick, 487 U.S. 589, 618 (1988) ("Although we have considered the problem of standing and Article III limitations on federal jurisdiction many times since [*Flast*], we have consistently adhered to *Flast* and the narrow exception it created to the general rule against taxpayer standing . . . .").

28. *See Flast*, 392 U.S. at 85-86.

29. *See id.* at 101.

30. *See id.* at 102 (The proper inquiry is "whether there is a logical nexus between the status asserted and the claim sought to be adjudicated.").

31. *See id.* This requirement satisfies the need for a logical link between the plaintiff's taxpayer status and the type of legislation that is attacked. *See id.* The Court further explained: "It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute." *Id.*

32. *See id.* at 102-03. This requirement satisfies the nexus between the taxpayer status and the nature of the constitutional violation alleged. *See id.* at 102. When both criteria are met, a taxpayer plaintiff will have a sufficient stake in the outcome of the litigation to invoke federal court jurisdiction. *See id.* at 103. Although *Flast* seems to leave open the question of which clauses of the Constitution are a "specific constitutional limitation" on Congress's taxing and spending power, in the nearly 40 years since *Flast* was decided, only the Establishment Clause has been deemed a

a "specific Constitutional limitation" on Congress's exercise of the taxing and spending power,[33] the plaintiffs had standing to challenge the federal expenditures at issue.[34]

2. The Court Chooses Not to Extend *Flast*: *Valley Forge Christian College v. Americans United for Separation of Church and State*

The Supreme Court has reiterated that Article III of the Constitution requires *Flast*'s two requirements to be met in order for a plaintiff to have taxpayer standing.[35] In *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*,[36] plaintiff taxpayers challenged the Federal Government's conveyance of surplus land to a Christian college, free of charge, as violative of the Establishment Clause.[37] The Court found, however, that the plaintiffs lacked standing because they satisfied neither of *Flast*'s two requirements.[38]

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sufficient limitation to satisfy *Flast*'s second prong. *See Cuno*, 126 S. Ct. at 1864; *see also Hein*, 127 S. Ct. at 2569 ("We have declined to lower the taxpayer standing bar in suits alleging violations of any constitutional provision apart from the Establishment Clause."); Luke Meier, *Constitutional Structure, Individual Rights, and the Pledge of Allegiance*, 5 FIRST AMENDMENT L. REV. 162, 179 (2006).

33. *See Flast*, 392 U.S. at 104. The Court noted that the First Amendment's drafters specifically feared that the taxing and spending power would be used in favor of one religion over another, thus impairing religious liberty. *See id.* at 103–04. Therefore, the Establishment Clause was drafted to prevent such abuses of the spending power. *See id.* Because plaintiffs had standing based on their Establishment Clause claim, the Court did not decide whether the Free Exercise Clause also operates as a specific limitation on Congress's taxing and spending power. *See id.* at 104 n.25.

34. *See id.* at 104. The Court distinguished taxpayer standing in the Establishment Clause context from the standing asserted in *Frothingham*. *See id.* at 104–05. The *Frothingham* plaintiff failed to satisfy the second requirement that her claim be based on Congress exceeding a specific constitutional limitation on its spending power. *See id.* at 105. Her claim was, instead, that Congress had acted outside the scope of its Article I enumerated powers, thus infringing on the states' powers. *See id.* Moreover, the claim that her Fifth Amendment Due Process rights were violated by the taxation was not sufficient because she failed to show that this harm resulted from Congress's breach of a specific constitutional limitation of its taxing and spending power. *See id.*

35. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 478–80 (1982).

36. *Id.* at 464.

37. *See id.* at 468–69. Pursuant to an act of Congress, government property that was no longer useful was declared "surplus," and the Secretary of Health, Education, and Welfare was authorized to dispose of the property for educational use. *See id.* at 466–67. The complaint alleged that the taxpayer plaintiffs "'would be deprived of the fair and constitutional use of his (her) tax dollar for constitutional purposes in violation of his (her) rights under the First Amendment of the United States Constitution.'" *Id.* at 469 (citation omitted).

38. *See id.* at 478–80. *Flast*'s two requirements are that: (1) plaintiffs must challenge a congressional act under the Taxing and Spending Clause; and (2) the act must violate a specific constitutional limitation on Congress's taxing and spending power. *See supra* notes 31–32 and

The first *Flast* prong was not met for two reasons. First, the plaintiffs challenged a decision by an Executive agency—the Department of Health, Education, and Welfare ("HEW")—instead of an act of Congress.[39] Second, the plaintiffs complained of a property transfer that was made by Congress's power under the Property Clause of the Constitution,[40] and not by the Taxing and Spending Clause, as required by *Flast*.[41] Although the Court recognized that plaintiffs may have suffered "the psychological consequence presumably produced by observation of conduct with which one disagrees," this "injury" was not sufficient to confer standing.[42] Moreover, the Court held there is no "citizen standing" to require that the government operate in accordance with the law.[43] The Court concluded that although no one might

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accompanying text.

39. *See Valley Forge*, 454 U.S. at 479. The Court reiterated that "*Flast* limited taxpayer standing to challenges directed 'only [at] exercises of congressional power.'" *Id.* (alteration in original) (quoting *Flast*, 392 U.S. at 102). Although an act of Congress had authorized HEW to dispose of the surplus property, the plaintiffs did not challenge the constitutionality of that act itself. *See id.* at 479 n.15. Therefore, taxpayer standing was not appropriate to challenge a mere Executive Branch action. Here, the Court cited *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974), in which there was no taxpayer standing because the plaintiffs "'did not challenge an enactment under Art. I, § 8, but rather the action of the Executive Branch.'" *Valley Forge*, 454 U.S. at 479 (quoting *Schlesinger*, 418 U.S. at 228).

40. The Property Clause gives Congress the power "to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States . . . ." U.S. CONST. art. IV, § 3, cl. 2.

41. *See Valley Forge*, 454 U.S. at 480. *Flast*'s first prong clearly required that taxpayers may only challenge "exercises of congressional power under the taxing and spending clause of Art. I, § 8 of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute." *Flast*, 392 U.S. at 102.

42. *See Valley Forge*, 454 U.S. at 485. For example, in *Doremus v. Board of Education*, plaintiffs did not have taxpayer standing to challenge a New Jersey law authorizing public school teachers to read passages from the Bible in the classroom. 342 U.S. 429, 435 (1952). The *Doremus* Court held there was no standing because the plaintiffs' grievance was "not a direct dollars-and-cents injury but [was] a religious difference." *Id.* at 434.

43. *See Valley Forge*, 454 U.S. at 483 ("The plaintiffs . . . plainly asserted a 'personal right' to have the Government act in accordance with their views of the Constitution . . . . But assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III . . . ."). For example, in *Schlesinger v. Reservists Committee to Stop the War*, the Court denied standing to plaintiffs who alleged that the armed forces reserve membership of members of Congress was in violation of the Incompatibility Clause of the Constitution. *See Schlesinger*, 418 U.S. at 209–11. The Court explained that the plaintiffs did not suffer a concrete injury, but a mere "abstract injury in nonobservance of the Constitution," which was insufficient to satisfy Article III's strict standing requirements. *Id.* at 223 n.13. The Court concluded:

> All citizens, of course, share equally an interest in the independence of each branch of Government. In some fashion, every provision of the Constitution was meant to serve the interests of all. Such a generalized interest, however, is too abstract to constitute a 'case or controversy' appropriate for judicial resolution. The proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries.

have standing to challenge the government conduct if the taxpayers were not granted standing, this fact alone was not sufficient to confer standing on the plaintiffs.[44] Although *Valley Forge* can be interpreted as limiting taxpayer standing to the specific holding in *Flast*, the Court later demonstrated that this is not entirely true.

3. "As Applied" Challenges Allowed: *Bowen v. Kendrick*

In *Bowen v. Kendrick*[45] the Court granted standing to taxpayer plaintiffs challenging a congressional act *as applied* by an executive agency.[46] The statute at issue involved a scheme for distributing grants to public and nonprofit organizations—including some religiously-affiliated organizations—to provide services and research concerning adolescent, premarital sexual relations and pregnancy.[47] The plaintiffs challenged the Act as applied by the Secretary of Health and Human Services, because the Secretary's discretion in defining the types of services grantees must provide to be eligible for funding had resulted in the direct advancement of religion.[48] The Court distinguished this case from *Valley Forge*, and held that although the "funding authorized by Congress has flowed through and been administered by the Secretary," the challenge was not "any less a challenge to congressional taxing and spending power . . . ."[49] Because the

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Id. at 226–27.

44. *See Valley Forge*, 454 U.S. at 489. Plaintiffs' claim that standing was needed "to assure a basis for judicial review" incorrectly relied on "the philosophy that the business of the federal courts is correcting constitutional errors, and that 'cases and controversies' are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor." *Id.*

45. 487 U.S. 589 (1988).

46. *See id.* at 620. The plaintiffs also challenged the statute on its face, and the Court acknowledged that "there is no dispute that appellees have standing to raise their challenge to the AFLA on its face." *Id.* at 618.

47. *See id.* at 593, 597. The challenged act was the Adolescent Family Life Act ("AFLA"), 42 U.S.C. § 300z, passed by Congress in 1981. *See id.* at 593.

48. *See id.* at 594, 599.

49. *Id.* at 619. Here, the defendants argued that *Flast*'s second prong was not met—that the "as applied" challenge was actually a challenge to Executive action, and not to Congress's exercise of authority under the Taxing and Spending Clause. *See id.* The Court distinguished *Valley Forge* because the challenged action there was pursuant to Congress's authority under the Property Clause. *See id.* Thus, although there was no standing in *Valley Forge* to challenge the decision of an Executive agency, there was standing here to challenge the agency's disbursement decisions because "[t]he AFLA [was] *at heart* a program of disbursement of funds pursuant to Congress' taxing and spending powers . . . ." *Id.* at 619–20 (emphasis added). The Court also noted that in *Flast* itself, the

action was essentially a challenge of Congress's taxing and spending powers, the fact that the actual process of disbursement by the executive agency was at issue did not operate to deny the plaintiffs standing.[50]

4. Pulling It All (Almost) Together: *Hein v. Freedom from Religion Foundation*

The most recent Supreme Court case to explain the taxpayer standing doctrine is *Hein v. Freedom from Religion Foundation, Inc.*, which was decided on June 25, 2007.[51] The *Hein* plaintiffs invoked taxpayer standing to bring a suit against the director of President Bush's White House Office of Faith-Based and Community Initiatives ("FBCI"). The suit alleged that conferences held as part of the FBCI program violated the Establishment Clause because the President and others "gave speeches that used 'religious imagery' and praised the efficacy of faith-based programs in delivering social services."[52] This case was different from the former taxpayer standing cases because the expenditures used to fund the challenged conferences were not specifically authorized by *Congress*; instead, the funds came from general appropriations to the *Executive Branch*.[53] Although the district court dismissed the case for lack of standing, the Seventh Circuit, in an opinion written by Judge Posner, held that the plaintiffs did indeed have taxpayer standing under these circumstances.[54] The Supreme Court, however, disagreed, and dismissed the suit.[55]

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suit was against the Secretary of HEW, and not Congress, because the Secretary had authority under the challenged statute to administer the congressionally-created spending regime. *See id.* at 619.

50. *See id.* at 619–20. The Court concluded: "[T]here is thus a sufficient nexus between the taxpayer's standing as a taxpayer and the congressional exercise of taxing and spending power, notwithstanding the role the Secretary plays in administering the statute." *Id.* at 620.

51. 127 S. Ct. 2553 (2007). Notably, *Hein* was decided over one year *after* the Seventh Circuit's *Laskowski* decision. Now that *Laskowski* has been vacated and remanded by the Supreme Court, the Seventh Circuit will have an opportunity to reconsider its *Laskowski* holding in light of the Supreme Court's reasoning in *Hein*. *See* University of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007) (granting certiorari, vacating opinion, and remanding for further reconsideration).

52. *See Hein*, 127 S. Ct. at 2559 (plurality opinion).

53. *See id.* The FBCI and other Executive Department Offices (which were created to run Bush's FBCI programs) were not authorized by any specific congressional legislation, but were "'created entirely within the executive branch . . . by Presidential executive order.'" *Id.* at 2560 (quoting Freedom from Religion Found., Inc. v. Chao, 433 F.3d 989, 997 (7th Cir. 2006)). Moreover, Congress did not enact any law specifically providing funding for these offices. *See id.* The challenged activities were "funded through general Executive Branch appropriations." *See id.*

54. *See Chao*, 433 F.3d at 990. The Seventh Circuit held that "the fact that [the FBCI program] was funded out of general rather than earmarked appropriations—that it was an executive rather than a congressional program—does not deprive taxpayers of standing to challenge it." *Id.* at 996. Judge Ripple dissented. *Id.* at 997 (Ripple, J., dissenting). In May of 2006, a majority of the Seventh Circuit voted to deny rehearing of the case *en banc*. *See* Freedom from Religion Found., Inc. v. Chao, 447 F.3d 988, 988 (7th Cir. 2006) (en banc). Interestingly, Judge Easterbrook wrote separately and suggested that not only the present decision, but *Laskowski* as well, may have been

Justice Alito, writing for the plurality, distinguished the present case from *Flast*, where the expenditures at issue "were made pursuant to an express congressional mandate and a specific congressional appropriation."[56] In *Hein*, "Congress provided general appropriations to the Executive Branch to fund its day-to-day activities," but the "appropriations did not expressly authorize, direct, or even mention the expenditures" at issue, which "resulted from executive discretion, not congressional action."[57] Thus, the requisite link between congressional action and the alleged constitutional violation was missing.[58] To support taxpayer status, however, the *Hein* plaintiffs relied heavily on *Kendrick*, where "'the funding authorized by Congress ha[d] flowed through and been administered' by an Executive Branch official."[59] Justice Alito distinguished *Kendrick* because, in that case, the statute was "'at heart a program of disbursement of funds pursuant to Congress' taxing and spending powers,'" and "the plaintiffs' claims 'call[ed] into question how the funds authorized by Congress [were] being disbursed *pursuant to the AFLA's statutory mandate.*'"[60] The *Hein* plaintiffs, on the other hand, could not cite any specific statute whose application they were challenging, but only cited unspecified, lump-sum

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decided incorrectly, and denied rehearing because he believed the Supreme Court should take up the intricate taxpayer standing issues. *See id.* at 989 (Easterbrook, J., concurring) (admitting that "there is considerable force in Judge Ripple's dissent, and in the standing analysis of Judge Sykes's dissent from *Laskowski v. Spellings*, which extends this panel's holding [in *Chao*]") (citations omitted).

55. *See Hein*, 127 S. Ct. at 2559 (pluarity opinion). Justice Alito, joined by Chief Justice Roberts and Justice Kennedy, wrote the plurality opinion. *Id.* at 2559–72. Justice Kennedy wrote a separate concurring opinion. *Id.* at 2572–73 (Kennedy, J., concurring). Justice Scalia, joined by Justice Thomas, wrote a separate opinion concurring only in the result, and not otherwise joining the plurality. *Id.* at 2573–84 (Thomas, J., concurring). Justice Souter dissented, joined by Justices Breyer, Ginsburg, and Stevens. *Id.* at 2584–88 (Souter, J., dissenting, joined by Breyer, Ginsburg, & Stevens, JJ.). It is not entirely clear which parts of this decision will become binding precedent. In cases such as this, where "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).

56. *Hein*, 127 S. Ct. at 2565 (plurality opinion).

57. *Id.* at 2566.

58. *See id.* Justice Alito noted that the connection to congressional action in this case was even weaker than in *Valley Forge*, where the challenged Executive Branch action was "at least 'arguably authorized'" by a specific act of Congress that permitted federal agencies to give surplus land to private entities. *See id.*

59. *Id.* at 2567 (quoting Bowen v. Kendrick, 487 U.S. 589, 619 (1988)).

60. *Id.* (quoting *Kendrick*, 487 U.S. at 619–20) (emphasis in original). Unlike *Hein*, *Kendrick* "involved a 'program of disbursement of funds pursuant to Congress' taxing and spending powers' that 'Congress had created,' 'authorized,' and 'mandate[d].'" *Id.* (alteration in original) (quoting *Kendrick*, 487 U.S. at 619–20).

appropriations "for the general use of the Executive Branch—the allocation of which 'is a[n] administrative decision traditionally regarded as committed to agency discretion.'"[61]

Justice Alito reasoned that "[b]ecause almost all Executive Branch activity is ultimately funded by some congressional appropriation, extending the *Flast* exception to purely executive expenditures would effectively subject *every federal action*—be it a conference, proclamation or speech—to Establishment Clause challenge by any taxpayer in federal court."[62] An exercise of such broad authority by the Judiciary would "raise serious separation-of-powers concerns," by making federal courts "'virtually continuing monitors of the wisdom and soundness of Executive action,' and that, most emphatically, 'is not the role of the judiciary.'"[63] Justice Alito concluded that although *Flast* has been criticized over the years, resolution of this case did not require a reconsideration of *Flast*'s holding, because the court below did not apply *Flast*—it expanded *Flast*.[64]

Justice Kennedy, although concurring with the plurality, wrote a separate opinion concluding that *Flast* is correct and should not be called into question, but that it should also not be extended to permit taxpayer standing under the present circumstances.[65] Justice Souter dissented,

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61. *Id.* (alteration in original) (quoting Lincoln v. Vigil, 508 U.S. 182, 192 (1993)). The plaintiffs' claim could not be characterized as an as-applied challenge to the lump-sum appropriations; such would "stretch the meaning of that term past its breaking point. It cannot be that every challenge to a discretionary Executive Branch action implicates the constitutionality of the underlying congressional appropriation." *Id.* at 2567–68. For instance, where a criminal defendant challenges a federal officer's actions as an unreasonable search or seizure under the Fourth Amendment, the Court does not review "that claim as an as-applied challenge to the constitutionality" of the underlying appropriation that funded the FBI. *See id.* at 2568.

62. *Id.* at 2569 (emphasis added).

63. *Id.* at 2569–70 (quoting Allen v. Wright, 468 U.S. 737, 760 (1984)). The plaintiffs listed a "parade of horribles" that would occur if *Flast* were not extended to cover these circumstances; for example, a federal agency could use its funds to build a church or to purchase crucifixes or Stars of David in bulk to hand out to the community. *See id.* at 2571. Justice Alito, however, noted that none of these things has happened in the past; if they did, Congress could quickly step in. *Id.* Moreover, some plaintiffs might have standing on grounds other than mere taxpayer status to challenge such abuses of power. *See id.*

64. *See id.* at 2571–72. Justice Scalia criticized the plurality's unwillingness "to acknowledge that the logic of *Flast* . . . is simply wrong, and for that reason should not be extended to other cases." *Id.* at 2580 (Scalia, J., concurring) (emphasis omitted).

65. *See id.* at 2572 (Kennedy, J., concurring). Justice Kennedy further explained the need to keep *Flast* a "narrow exception" to the bar on taxpayer standing, for "[t]o find standing in the circumstances of this case would make the narrow exception boundless." *Id.* The speeches and conferences challenged in this case "are part of the open discussion essential to democratic self-government. The Executive Branch should be free, as a general matter, to discover new ideas, to understand pressing public demands, and to find creative responses to address governmental concerns." *Id.* Permitting taxpayer standing here would result in "potentially innumerable cases," and "would lead to judicial intervention so far exceeding traditional boundaries on the Judiciary that there would arise a real danger of judicial oversight of executive duties." *Id.* at 2572–73.

concluding that the plaintiffs had standing to bring their challenge to the Executive Branch expenditures.[66]

Justice Scalia, joined by Justice Thomas, concurred in the result only, and wrote separately that "*Flast* is wholly irreconcilable with the Article III restrictions on federal-court jurisdiction . . . embodied in the doctrine of standing," and should be overruled.[67] In coming to this conclusion, Justice Scalia makes a distinction between what he terms "Wallet Injury"—"a claim that the plaintiff's tax liability is higher than it would be, but for the allegedly unlawful government action"[68]—and "Psychic Injury," which "consists of the taxpayer's *mental displeasure* that money extracted from him is being spent in an unlawful manner."[69] According to Justice Scalia, *Flast* allows "a peculiarly restricted version of Psychic Injury, permitting taxpayer displeasure over unconstitutional spending to support standing only if the constitutional provision allegedly violated is a specific limitation on the taxing and spending power."[70] Justice Scalia explains that the taxpayer standing cases are inconsistent, in that the Court denied standing based on Psychic Injury in *Frothingham*, *Doremus*, and *Valley Forge*, but allowed it in *Flast* and *Kendrick*.[71] Justice Scalia criticizes the plurality and dissenting

66. *See id.* at 2584 (Souter, J., dissenting). Justice Souter's dissent begins with the extremely broad claim that "*Flast* . . . held that plaintiffs with an Establishment Clause claim could 'demonstrate the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III requirements.'" *Id.* (quoting Flast v. Cohen, 392 U.S. 83, 102 (1968)). But cases like *Valley Forge* and *Doremus v. Board of Education*, 342 U.S. 429, 433 (1952) (denying taxpayer standing to challenge a state law authorizing public school teachers to read from the Bible) show that Justice Souter's interpretation of *Flast* is too broad; in reality, only plaintiffs with an Establishment Clause claim *that satisfies* Flast*'s two-pronged test* have taxpayer standing. *See supra* notes 35-44 and accompanying text.

67. *See Hein*, 127 S. Ct. at 2574, 2584 (Scalia, J., concurring).

68. *Id.* at 2574.

69. *Id.* For standing purposes, the problem with Wallet Injury lies in satisfying traceability and redressability. *See id.* Psychic Injury, however, is easily traceable to the government's use of the tax funds, and is redressable by an injunction forbidding such spending. *See id.*

70. *See id.* (emphasis omitted). Justice Scalia reasons that this allowance of standing for Psychic Injury, albeit restricted, does not comport with the general rule that "a plaintiff lacks a concrete and particularized injury when his only complaint is the generalized grievance that the law is being violated." *Id.*; *see also* Lance v. Coffman, 127 S. Ct. 1194, 1196 (2007) (reaffirming that "'a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy'" (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 573–74 (1992))). Justice Scalia explains that "[in *Frothingham*] we initially denied taxpayer standing based on Wallet Injury, but then found standing in [*Flast* and] some later cases based on the limited version of Psychic Injury described above." *See Hein*, 127 S. Ct. at 2574–75 (Scalia, J., concurring).

71. *See Hein*, 127 S. Ct. at 2579 (Scalia, J., concurring). *Compare* Frothingham v. Mellon, 262

opinions for perpetuating *Flast*'s logical incoherency and for creating a new "meaningless distinction,"[72] and concludes that *Flast* should be overruled because Psychic Injury does not satisfy Article III's standing requirements.[73]

U.S. 447, 488 (1923) ("The party who invokes the power [of judicial review] must be able to show . . . that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."), *and Doremus*, 342 U.S. at 434 (denying taxpayer standing because the plaintiffs' grievance was "not a direct dollars-and-cents injury but . . . a religious difference"), *and* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 485–86 (1982) ("[Plaintiffs] fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III . . . . [R]espondents are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy.") (emphasis omitted), *with Flast*, 392 U.S. at 92, 106 (holding that taxpayers do not have an interest in the moneys of the treasury [Wallet Injury], but that taxpayers do suffer injury-in-fact and have standing when their tax money is being spent in violation of the Establishment Clause [Psychic Injury]), *and* Bowen v. Kendrick, 487 U.S. 589, 618–20 (1988) (relying on *Flast* to allow taxpayer standing).

In *DaimlerChrysler Corp. v. Cuno*, the Court recently explained:

> *Flast* is consistent with the principle, underlying the Article III prohibition on taxpayer suits, that a litigant may not assume a particular disposition of government funds in establishing standing [Wallet Injury]. The *Flast* Court discerned in the history of the Establishment Clause "the specific evils feared by [its drafters] that the taxing and spending power would be used to favor one religion over another or to support religion in general." The Court therefore understood the "injury" alleged in Establishment Clause challenges to federal spending to be the very "extract[ion] and spen[ding]" of "tax money" in aid of religion alleged by a plaintiff [Psychic Injury]. And an injunction against the spending would of course redress *that* injury, regardless of whether lawmakers would dispose of the savings in a way that would benefit the taxpayer-plaintiffs personally [Wallet Injury].

126 S. Ct. 1854, 1865 (2006) (citations omitted) (quoting *Flast*, 392 U.S. at 103, 106).

72. *See Hein*, 127 S. Ct. at 2579–82, 2584 (Scalia, J., concurring). Justice Scalia criticizes the plurality for failing to recognize that *Flast* is wrong, and for creating an irrelevant distinction between expenditures expressly authorized by Congress and those authorized only by the Executive Branch, concluding that "[w]hether the challenged government expenditure is expressly allocated by a specific congressional enactment has absolutely no relevance to the Article III criteria of injury in fact, traceability, and redressability." *Id.* at 2580 (emphasis omitted). Justice Scalia criticizes the dissent for adopting the respondents' position "that the injury in *Flast* was merely the governmental extraction and spending of tax money in aid of religion." *Id.* at 2581. Such an argument implies "that *every* expenditure of tax revenues that is alleged to violate the Establishment Clause is subject to suit under *Flast*," which is clearly contradictory to precedent. *See id.*

73. *See id.* at 2582–84. Justice Scalia explains that "a taxpayer's purely psychological displeasure that his funds are being spent in an allegedly unlawful manner" is never "sufficiently concrete and particularized to support Article III standing[.]" *See id.* at 2582. Plaintiffs raising "'only a generally available grievance about government'" do not satisfy Article III's requirements, and *Flast*'s two-pronged nexus test does not cure the deficiency. *Id.* at 2582–83 (quoting *Lujan*, 504 U.S. at 573–74). Justice Scalia concludes:

> *Flast*'s lack of a logical theoretical underpinning has rendered our taxpayer-standing doctrine such a jurisprudential disaster that our appellate judges do not know what to make of it . . . . I can think of few cases less warranting of *stare decisis* respect. It is time—it is past time—to call an end. *Flast* should be overruled.

Id. at 2584.

Both the plurality opinion and Justice Scalia's concurring opinion in *Hein* impact the taxpayer standing analysis in *Laskowski v. Spellings*.[74]

B. Mootness: "The Doctrine of Standing Set in a Time Frame"[75]

Like standing, the requirement that a case before a court not be moot also stems from Article III's "case or controversy" requirement.[76] Article III requires that there be a live case or controversy not only when a suit is filed, but also at the time the court decides a case.[77] A claim is moot "if an event occurs [pending review] that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party," and the case must be dismissed.[78] Therefore, if a challenged statute is repealed or expires before a court hears the case, it is deemed moot and is dismissed because the controversy is no longer "live."[79] Whether a case becomes moot in situations such as *Laskowski*—where a one-time grant has expired and the funds have been spent—depends upon whether restitution is a proper remedy that a court may still award. However, restitution is not the usual remedy for constitutional violations, and has only been applied by the Supreme Court in two Establishment Clause cases.[80]

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74. *See infra* Part III.

75. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 189 (2000) (quoting Arizonans for Official English v. Arizona, 520 U.S. 43, 68 n.22 (1997)).

76. *Cuno*, 126 S. Ct. at 1867.

77. *See* Fed. Election Comm'n v. Wis. Right To Life, Inc., 127 S. Ct. 2652, 2662 (2007) ("Article III's 'case-or-controversy requirement subsists through all stages of federal judicial proceedings . . . . [I]t is not enough that a dispute was very much alive when suit was filed.'" (alteration in original) (quoting Lewis v. Cont'l Bank Corp., 494 U.S. 472, 477 (1990))).

78. Church of Scientology of Cal. v. United States, 506 U.S. 9, 12 (1992) (quoting Mills v. Green, 159 U.S. 651, 653 (1895)).

79. *See, e.g.*, Fed'n of Adver. Indus. Representatives, Inc. v. City of Chi., 326 F.3d 924, 931 (7th Cir. 2003) ("'As a general rule, if a challenged law is repealed or expires, the case becomes moot' except where 'it is virtually certain that the repealed law will be reenacted.'" (quoting Native Vill. of Noatak v. Blatchford, 38 F.3d 1505, 1510 (9th Cir. 1994))).

80. *See* IRA LUPU & ROBERT TUTTLE, LEGAL UPDATE: AMERICAN JEWISH CONGRESS V. BOST, ROUNDTABLE PUBLICATIONS, June 13, 2006, *available at* http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=4 ("When a court determines that a government expenditure or program violates the Establishment Clause, the normal remedy is an order to stop the offending activity, i.e., an injunction.").

C. *The History of Restitution in the Establishment Clause Context*

Restitution is generally described as "a return or restoration of what the defendant has gained in a transaction."[81] The purpose of restitution is "to prevent the defendant's unjust enrichment by recapturing the gains the defendant secured in a transaction."[82] Although restitutionary recoupment has never been allowed as a constitutional remedy (until *Laskowski*),[83] a few Establishment Clause cases prior to *Laskowski* shed light on the Seventh Circuit's reasoning in allowing such a remedy.

1. The Court Allows Government Payments Under an Unconstitutional Statute: *Lemon v. Kurtzman*

In the seminal case of *Lemon v. Kurtzman* (*Lemon I*), the Supreme Court held that a Pennsylvania program that reimbursed sectarian schools for providing particular educational services violated the Establishment Clause.[84] The case was remanded to the district court, which entered summary judgment in favor of the plaintiffs and enjoined the payment of

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81. 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES: DAMAGES – EQUITY – RESTITUTION § 4.1(1), at 365 (2d ed. 1993).

82. *Id.* at 366.

83. *See* Brief for the United States as Amicus Curiae Supporting Appellants at 5–6, Ams. United for Separation of Church & State v. Prison Fellowship Ministries, 509 F.3d 406 (8th Cir. 2007) (No. 06-2741), 2006 WL 3098141 ("*Laskowski* was the first decision of which we are aware suggesting that a federal court may order one private party, at the behest of another private party, to reimburse the public treasury, when the government itself has not sought reimbursement.").

84. *See* Lemon v. Kurtzman (*Lemon I*), 403 U.S. 602, 606–07 (1971). The Supreme Court reviewed both Rhode Island and Pennsylvania statutory schemes, and found both to be unconstitutional, but only the Pennsylvania case is relevant to this discussion. *See id.* Notably, in addition to individuals, organizational plaintiffs including Americans United for Separation of Church and State and the American Civil Liberties Union of Pennsylvania were originally joined as plaintiffs challenging the state law. *See* Lemon v. Kurtzman, 310 F. Supp. 35, 35 (E.D. Pa. 1969), *rev'd*, 403 U.S. 602 (1971). Although the organizations had an interest in the issues to be decided, the organizational plaintiffs did not have a sufficient personal or legal stake in the outcome of the litigation, and therefore lacked standing. *See id.* at 41. Interestingly, these organizational plaintiffs "argued that they should be permitted to sue here as private attorneys general," but the court found "no precedent or persuasive reason to adopt this theory in the instant case. Indeed, to do so may result in the rendering of an advisory opinion on a constitutional matter in contravention of Article III of the Constitution." *Id.* at 41 n.13 (citing Muskrat v. United States, 219 U.S. 346 (1911)). The court found an individual taxpayer, however, did have standing, by expanding *Flast*'s rationale to include suits by *state* taxpayers challenging a *state* statutory scheme that allegedly violates the Establishment Clause. *See id.* at 41–42. The Supreme Court later held that in some instances, organizational plaintiffs may have standing to sue. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 181 (2000) ("An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." (quoting Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977))).

state money to the schools.[85] However, at this point in the litigation, a dispute between the parties continued regarding the remedial effect of the Court's declaring the statutory scheme unconstitutional.[86] The plaintiffs argued that once a statute was declared unconstitutional, it became "void" and any contracts depending on that statute also become void.[87] The defendants argued that the unconstitutionality of the statute should not be applied retroactively to void the contract with the state for funding, on which the schools had relied in making expenditures, but instead should be applied only *prospectively*, to future cases.[88]

The district court was forced to decide "whether agreements to reimburse church-related schools made *prior* to the Court's decision in this case may be performed."[89] The district court found that "to deny the church-related schools any reimbursement for their services rendered would impose upon them a substantial burden which would be difficult for them to meet," and concluded that the state funds allocated to reimburse the non-public schools for services rendered prior to the Supreme Court's decision could be paid.[90]

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85. *See* Lemon v. Kurtzman, 348 F. Supp. 300, 301 n.1 (E.D. Pa. 1972).

86. *See id.* at 301.

87. *See id.* The schools began performing services under their contract with the state in September 1970, for the 1970–71 school year. *See* Lemon v. Kurtzman (*Lemon II*), 411 U.S. 192, 197 (1973). However, on June 28, 1971, the Supreme Court held the state's statutory scheme to be unconstitutional. *See id.*

88. *See Lemon II*, 411 U.S. at 197. Although the statutory arrangement had been enjoined from continuing in the future, the schools had already performed their part of the contract in reliance on the state funding, and had not been reimbursed since the statute was declared unconstitutional. *See Lemon*, 348 F. Supp. at 304 ("In reliance on these 'contracts', the non-public schools adjusted their budgets accordingly and performed the services required by them."). In essence, the issue was whether the state government should be prevented from complying with its contractual duty to pay the schools for their services, because the contract was made pursuant to a statute which was now held to be unconstitutional. If the *Lemon* holding was to be applied *prospectively* (and not retroactively), the contract could still be performed to the extent that the sectarian schools had incurred a burden in reliance on the contract's validity.

89. *Lemon*, 348 F. Supp. at 303 (emphasis added). It should be noted that this is a different issue than that in *Laskowski*. In *Laskowski*, the remedial issue was whether once a congressional grant is found to be unconstitutional, the party who received that grant should pay the funds back to the government, even if the funds have been spent or given away. *See supra* note 3. In contrast, the *Lemon* plaintiffs did "not seek to require the schools to disgorge prior payments received under [the now-unconstitutional Act]." *See Lemon II*, 411 U.S. at 198; *see also id.* at 194 ("Appellants made no claim that appellees refund all sums paid under the Pennsylvania statute struck down in Lemon I."). Thus, *Lemon II* does not directly involve the issue of restitution or a "recoupment" remedy, but its reasoning is relevant to analysis of the recoupment issue.

90. *Lemon*, 348 F. Supp. at 304–05. In making its decision, the district court "'weigh[ed] the merits and demerits in [the] case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.'" *Id.* at 303

Once again, the case made its way back to the Supreme Court, on the issue of whether the district court erred in allowing the state to pay $24 million to compensate the sectarian schools for their services rendered prior to the *Lemon I* decision.[91] In *Lemon II*, the Court considered the doctrines of retroactivity[92] and equitable remedies, finding that "the proposed distribution of state funds to Pennsylvania's nonpublic sectarian schools will not substantially undermine the constitutional interests at stake in *Lemon I*."[93] The Court also noted that reliance interests are an important consideration in shaping an appropriate equitable remedy, and the schools had incurred expenses in reliance on their contract with the state.[94] The plaintiffs urged that the sectarian schools were "foolhardy" in relying on state reimbursement, because of "the constitutional cloud over the Pennsylvania program from the outset."[95] However, the Court dismissed this notion, holding that because the schools had not acted in bad faith or "relied on a plainly unlawful statute," and because the constitutional outcome of the case could not have been predicted from the outset, the schools' reliance was reasonable.[96] The Supreme Court thus affirmed the

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(quoting Linkletter v. Walker, 381 U.S. 618, 629 (1965)). The court further "examine[ed] the decision of the Supreme Court in this case to determine whether prospective application would in any way undermine its underlying basis and its rationale and . . . balance[d] the equities between the parties." *Id.*

91. *See Lemon II*, 411 U.S. at 194. According to the Court, "the problem . . . is essentially one relating to the appropriate scope of federal equitable remedies, a problem arising from enforcement of a state statute during the period before it had been declared unconstitutional." *Id.* at 199. The court noted that in the constitutional context, "equitable remedies are a special blend of what is necessary, what is fair, and what is workable." *Id.* at 200; *see also* DOBBS, *supra* note 81, § 4.1(1), at 553 ("Benefits conferred by mistake often provide grounds for restitution of the benefits. A plaintiff who enters into a contract with the defendant under an important mutual mistake may be able to avoid the contract altogether and recover back any benefits he has conferred in performing.").

92. The Court considered the *Linkletter* test, which the district court had applied. *See supra* note 90. However, the Court noted that *Linkletter* involved whether or not a new constitutional rule of criminal law should be applied when reviewing a conviction judgment made under the prior standard, and was thus different from the issue in this case. *See Lemon II*, 411 U.S. at 199.

93. *Lemon II*, 411 U.S. at 201.

94. *See id.* at 203. Although there was "no demonstration by the appellee schools of the precise amount of any detriment incurred by them during the 1970–71 school year in the expectation of reimbursement by the State," the Court noted that such a demonstration would be complex and concluded that the district court was reasonable in finding reliance. *Id.* at 205.

95. *See id.* at 206. The plaintiffs-appellants argued that there was a "constitutional cloud" over the act in question because it "was an 'untested' state statute whose validity had never been authoritatively determined." *Id.* at 207. The Court, however, correctly noted the absurdity that would result from this reasoning: "Appellants would have state officials stay their hands until newly enacted state programs are 'ratified' by the federal courts, or risk draconian, retrospective decrees should the legislation fall." *Id.* The Court concluded that "state officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful." *Id.* at 209.

96. *Id.* at 207. The Court acknowledged that it was clear the act would be attacked on constitutional grounds "from the outset." *Id.* But because the outcome of *Lemon I* could not be "predicted with assurance," the schools' reliance was reasonable. *Id.*

district court's allowance of the state payments to the sectarian schools under the unconstitutional statutory scheme.[97]

D. *The Supreme Court's First Reflections on the Recoupment Remedy:* Roemer v. Board of Public Works of Maryland

In *Roemer v. Board of Public Works of Maryland*,[98] the Supreme Court found that a Maryland Act that provided annual "noncategorical grants" to religiously affiliated colleges, subject to the restriction that the funds "not be used for sectarian purposes," did not violate the Establishment Clause.[99] However, under an earlier version of the statute, there were no restrictions on the grants to prevent the sectarian use of the funds.[100] At the district court level, the plaintiffs had challenged the prior version of the Maryland Act and sought "a declaration that all funds received by the recipient institutions be paid over to the state with interest."[101] The district court found that the prior version of the statute was indeed unconstitutional, but it did not order a refund of the amounts previously paid under the unconstitutional statute.[102] According to the district court, this "refund" remedy was barred by the decision in *Lemon II*.[103]

The Supreme Court, however, did not directly address the constitutionality of the prior statute (or the refund remedy) because that part of the district court's ruling was not challenged on appeal by the plaintiffs.[104] In dicta, the Supreme Court did, however, note that the district court's ruling regarding the refund remedy was consistent with *Lemon II*.[105] The Court explained that *Lemon II* set forth "two considerations primarily relevant to the question of retroactive remedy: (1) the reasonableness and

97. *See id.* at 209.

98. 426 U.S. 736 (1976).

99. *See id.* at 739–67.

100. *See* Roemer v. Bd. of Pub. Works of Md., 387 F. Supp. 1282, 1291 (D. Md. 1974).

101. *See id.* at 1284; *Roemer*, 426 U.S. at 744. This remedy is precisely the remedy at issue in *Laskowski*, *supra* note 3.

102. *See Roemer*, 387 F. Supp. at 1292; *Roemer*, 426 U.S. at 745.

103. *See Roemer*, 387 F. Supp. at 1291–92; *Roemer*, 426 U.S. at 745. Applying *Lemon II*'s analysis of retroactivity and equity principles, the district court found that a refund was not proper for two reasons: (1) the defendant schools had already spent the funds allocated for the year in question, in reliance on the program's constitutionality; and (2) the statute had been amended, and was no longer constitutional. *Roemer*, 387 F. Supp. at 1291–92. Thus "[t]he constitutional values to be protected by the Establishment Clause would not be furthered by refund despite the unconstitutionality of the [prior] version of the Act." *Id.* at 1292.

104. *See Roemer*, 426 U.S. at 767 n.23.

105. *Id.*

degree of reliance by the institutions on the payments, and (2) the necessity of refunds to protect the substantive constitutional rights involved."[106] The Court stated that the degree of reliance in the present case was even greater than in *Lemon II*, where the reliance was on funds which had not yet been given, because here the funds in question "long since have been paid out to, and spent by, the colleges."[107] Moreover, the Court noted that "the separation of church and state may well be better served by not putting the State of Maryland in the position of a judgment creditor of the appellee colleges."[108] Thus, although the Supreme Court did not directly answer the refund remedy issue, it did suggest that *Lemon II* provides a framework for analyzing such remedial issues.

E. *The Court Puts* Lemon II*'s Analysis to Work:* New York v. Cathedral Academy

The Supreme Court once again addressed the issues raised in *Lemon II* and *Roemer* in *New York v. Cathedral Academy.*[109] In *Cathedral Academy*, a sectarian school made a claim for reimbursement of expenses it incurred under a state statute that had been declared an unconstitutional violation of the Establishment Clause.[110] The district court permanently enjoined future payments from being issued under the statute, including payments to reimburse the schools for expenses they had already incurred up to that point.[111] The New York legislature, however, passed a new statute permitting reimbursement to the schools, notwithstanding the court's order.[112] Cathedral Academy brought a claim for reimbursement under the

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106. *Id.*

107. *Id.* The Court also noted that the reliance was more reasonable here because in *Lemon II* the schools acted in reliance on a statute that was already being challenged in court, whereas here, the reliance occurred *before* the suit was even filed. *See id.*

108. *Id.*

109. *See* New York v. Cathedral Acad., 434 U.S. 125 (1977).

110. *See id.* at 127. The original state statute "authorized fixed payments to nonpublic schools as reimbursement for the cost of certain recordkeeping and testing services required by state law." *Id.* A three-judge panel for the United States District Court for the Southern District of New York held the act unconstitutional under *Lemon I* because "the cumulative impact of the entire relationship arising under the statute[s] . . . involves excessive entanglement between government and religion." Comm. for Pub. Educ. & Religious Liberty v. Levitt, 342 F. Supp. 439, 443 (S.D.N.Y. 1972) (alteration in original).

111. *See Cathedral Acad.*, 434 U.S. at 127. The Supreme Court subsequently affirmed the district court's judgment. *See* Levitt v. Comm. for Pub. Educ. & Religious Liberty, 413 U.S. 472, 482 (1973).

112. *See Cathedral Acad.*, 434 U.S. at 127. The new statute:

> "recognize[d] a moral obligation to provide a remedy whereby . . . schools may recover the complete amount of expenses incurred by them prior to June thirteenth [, 1972,] in reliance on" the invalidated [prior statute], and conferred jurisdiction on the New York Court of Claims "to hear, audit and determine" the claims of nonprofit private schools for

new statute, but the Supreme Court struck down the New York statute on Establishment Clause grounds.[113] Although Cathedral Academy argued it had relied to its detriment on the statute before it was declared unconstitutional, the Court disagreed because "the Academy was required by pre-existing state law to perform the services reimbursed under [the first statute]."[114] Because the second statute was unconstitutional, and *Cathedral Academy* was distinguishable from *Lemon II*, the school could not be reimbursed for its expenditures made pursuant to the first statute.[115]

F. Laskowski*'s Predecessor:* American Jewish Congress v. Bost

One additional case, from a district court in Texas, is worthy of examination because of its striking similarity to the facts of *Laskowski*. In *American Jewish Congress v. Bost*,[116] state taxpayer plaintiffs specifically requested recoupment of funds to the state treasury which had allegedly been spent in violation of the Establishment Clause, in order to save a moot claim against a Texas governmental agency.[117] The contract at issue in *Bost* was between the Texas Department of Human Services ("TDHS") and the Jobs Partnership of Washington County ("JPWC")—a non-profit consortium including businesses and churches—whereby TDHS gave $8,000 to JPWC

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such expenses.

Id. (first and second alterations in original). Thus, the New York Legislature expressly authorized the reimbursement that the district court's injunction had prohibited. *See id.*

113. *See id.* at 133. The Court distinguished *Lemon II* because there, the constitutional evil was "excessive governmental entanglement" caused by the statutory procedures, while the payments themselves were otherwise permissible. *See id.* at 129. Here, the problem was not just the procedural framework by which the payments were made, but was with the payments themselves. *See id.* at 131. Moreover, the reimbursements sought were pursuant to an entirely new statute, which the state legislature had passed essentially to overrule the court's injunction prohibiting payments under the first statute. *See id.* at 130. Therefore, the second statute was invalid because "[t]o approve the enactment of [the second statute] would thus expand the reasoning of *Lemon II* to hold that a state legislature may effectively modify a federal court's injunction whenever a balancing of constitutional equities might conceivably have justified the court's granting similar relief in the first place." *Id.*

114. *Id.* at 134. Because there was a pre-existing obligation for the schools to perform such duties, regardless of whether they would be reimbursed under the first statute, "the Academy's detrimental reliance on the promise of [the first statute] was materially different from the reliance of the schools in *Lemon II*." *Id.*

115. *See id.*

116. No. A-00-CA-528-SS, 2002 WL 31973707 (W.D. Tex. July 16, 2002). This case was not reported in the Federal Supplement, but because of its similarity to the facts in *Laskowski*, its reasoning is instructive for purposes of this article.

117. *See id.* at *1.

for a "welfare-to-work" training program.[118] The contract ran from February 19 through December 31, 1999,[119] and contained a provision that "no state expenditures can have as their objective the funding of sectarian worship, instruction, or proselytization."[120]

State taxpayers filed suit on July 24, 2000, challenging the contract as violative of the Establishment Clause, and alleging that JPWC spent some of the funds on Bibles and that Bible references were used in the teaching.[121] However, because the suit was filed eight months after the contract's expiration, and the contract was not renewed, nor were there any current contractual relations between the parties, the district court dismissed the suit as moot.[122] The court also found that the plaintiffs lacked standing to assert a claim for recoupment because "unlike *Flast*, these plaintiffs are not seeking prospective, injunctive relief but rather remedial recoupment," and the court could find no case law to support the plaintiffs' claim that taxpayer standing allows such a suit.[123] Although *Bost* is merely a district court opinion, it is one example of how a case like *Laskowski* would have been decided prior to the Seventh Circuit's allowance of the recoupment remedy.[124]

III. JUDICIAL IMPOSITION OF THE RECOUPMENT REMEDY: *LASKOWSKI V. SPELLINGS*

In *Laskowski v. Spellings*,[125] the main issue was whether plaintiffs have a right to seek restitution from a grantee of government funds on behalf of the Federal Treasury.[126] This issue was not present at the case's inception, however, but became an issue later. *Laskowski* involved the University of Notre Dame's institution of a program called the Alliance for Catholic

118. *See id.*

119. *See id.*

120. LUPU & TUTTLE, *supra* note 80 (internal quotations omitted) (citing Scott S. Greenberger, *With Nod from Bush, State and Religion Join Forces for Jobs*, AUSTIN AMERICAN-STATESMAN, Dec. 26, 1999).

121. *See Bost*, 2002 WL 31973707, at *1.

122. *See id.* The court "questioned what benefit plaintiffs could derive from injunctive relief related to a one-time contract that expired thirteen months before the Court issued its opinion," and then "held that it had no subject matter jurisdiction over plaintiff's claims as there was no live case or controversy . . . ." *Id.*

123. *Id.* at *2.

124. Indeed, the district court's opinion in *Bost* is quite similar to the district court's opinion in *Laskowski*, because the courts decided the similar issues in the same way. *See infra* Part III.A. *Bost*'s recognition that a recoupment remedy is unsupported by case law also demonstrates how remarkable and unprecedented Judge Posner's holding is in *Laskowski*. *See infra* Part III.B.

125. 443 F.3d 930 (7th Cir. 2006), *vacated and remanded sub nom.* Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007).

126. *See id.* at 934.

Education ("ACE").[127] The ACE program was designed to train university students to become future teachers in Catholic schools, and its three main objectives were professional development, community life, and spiritual growth.[128] Thus, the program had both religious and secular components.[129] In 1998, Notre Dame undertook measures to replicate the ACE program at other universities by helping them to establish similar programs on their own campuses.[130]

On November 29, 1999, Congress earmarked $500,000 to be given to Notre Dame as part of a grant to over fifty-one colleges, universities, and higher education programs designed to address teacher shortages.[131] In 2000, the United States Department of Education ("DOE") awarded Notre Dame $462,500, whereby Notre Dame would redistribute the money to other religious colleges in order to replicate the ACE program on each of their campuses.[132] The earmarked grant monies were awarded to Notre Dame for the period of January 6, 2000, through December 31, 2004.[133] Throughout this period, Notre Dame spent the grant money by distributing the funds to the universities in the ACE replication program and by spending portions of the funds on "recruiting, travel, office expenses, and stipends for professional mentors."[134]

On December 2, 2003, federal taxpayers filed a complaint against Margaret Spellings, Secretary of the DOE, to enjoin the grant.[135] The plaintiffs alleged that the DOE violated the Establishment Clause by providing federal funds to Notre Dame's ACE replication program[136]

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127. *Id.* at 933.

128. *Id.*

129. *See id.*

130. *See* Brief of Defendant-Intervenor-Appellee at 3, Laskowski v. Spellings, 443 F.3d 930 (7th Cir. 2006) (No. 05-2749), 2005 WL 3739459.

131. *See* Consolidated Appropriations Act of 2000, Pub. L. No. 106-113, § 309, 113 Stat. 1501, 1501A–262 (1999) ("$500,000 for the University of Notre Dame for a teacher quality initiative . . . ."); Brief of Defendant-Intervenor-Appellee, *supra* note 130, at 3.

132. *See* Appellants' Brief and Short Appendix at 7, Laskowski v. Spellings, 443 F.3d 930 (7th Cir. 2006) (No. 05-2749), 2005 WL 3739458.

133. *See* Laskowski v. Spellings, No. 1:03-CV-1810 LJM-WTL, 2005 WL 1140694, at *1 (S.D. Ind. May 13, 2005), *vacated and remanded*, 443 F.3d 930 (2006), *vacated and remanded sub nom.* Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007).

134. *See* Brief of Defendant-Intervenor-Appellee, *supra* note 130, at 7–8.

135. *See* Laskowski v. Spellings, 443 F.3d 930, 933 (7th Cir. 2006), *vacated and remanded sub nom.* Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007).

136. Under the Lemon Test (set forth in *Lemon I*), three prongs must be satisfied in order for a statute to pass constitutional muster under the Establishment Clause: (1) "the statute must have a secular legislative purpose;" (2) "its principal or primary effect must be one that neither advances

because: (1) eligibility for the Grant was not determined neutrally;[137] (2) "the Grant was not allocated based on private choices";[138] and (3) "the Grant money was not tracked or monitored to ensure that it was not actually diverted to religious use."[139]

A. District Court Opinion

On February 19, 2004, Notre Dame intervened as a defendant in the action.[140] Then, on cross-motions for summary judgment, the district court issued an opinion on May 13, 2005.[141] In their motions for summary judgment, defendants Notre Dame and the DOE argued that the case was moot because the grant period had ended and all of the grant funds had been

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nor inhibits religion;" and (3) "the statute must not foster 'an excessive government entanglement with religion.'" Lemon v. Kurtzman (*Lemon I*), 403 U.S. 602, 612–13 (1971) (citations omitted). Here, the plaintiffs alleged that the statutory scheme by which Notre Dame received the government funds violated the second prong by impermissibly advancing religion. *See* Appellants' Brief and Short Appendix, *supra* note 132, at 47.

137. *Laskowski*, 2005 WL 1140694, at *1. The plaintiffs' claim regarding neutrality is somewhat vague. The plaintiffs alleged that "[e]very government aid case requires at least *some* discernable criteria with which government grants are made; otherwise, there is no way to determine neutrality." Appellants' Brief and Short Appendix, *supra* note 132 at 43 n.43. Therefore, according to the plaintiffs, the grant was not neutral because "it was not given based upon *any* discernable standards at all." *Id.*

138. *Laskowski*, 2005 WL 1140694, at *1. The plaintiffs alleged that the "government aid reache[d] a religious institution not as a result of the true private choices of individual citizens, but as a result of a government decision to provide direct monetary aid to a religious entity," thus making the statutory scheme "constitutionally suspect." *See* Appellants' Brief and Short Appendix, *supra* note 132, at 41–42. Plaintiffs thus argued that "an *unrestricted* direct subsidy to a religious institution 'is viewed as governmental advancement or indoctrination of religion.'" *Id.* at 42 (quoting Freedom from Religion Found. v. Bugher, 249 F.3d 606, 610–11 (7th Cir. 2001) (holding a "direct aid" program unconstitutional for its lack of statutory restrictions on use of the money and failure to monitor the schools' use of the funds)).

139. *Laskowski*, 2005 WL 1140694, at *1. According to the plaintiffs, "although a regulation existed under which the FIPSE [Fund for the Improvement of Post Secondary Education] monies were not to be spent for religious use, there was no administrative enforcement of that regulation" and therefore the FIPSE funds were not tracked in such a way as to determine whether they were put only to secular use. Appellants' Brief and Short Appendix, *supra* note 132, at 46–47.

140. *See* Appellants' Brief and Short Appendix, *supra* note 132, at 2. Prior to Notre Dame's intervention, the only defendant was the U.S. Government. Interestingly, if Notre Dame had not intervened, when the grant expired and the claim against the Government for injunctive relief became moot, the Seventh Circuit would not have been able to keep the case alive. Thus, if Notre Dame was not present as a defendant in the action, the recoupment remedy would not be possible. Following Notre Dame's intervention, the DOE filed an answer on March 2, 2004, and discovery in the case remained open until October 11, 2004. *See Laskowski,* 2005 WL 1140694, at *1. Then, on November 8, 2004, the plaintiffs filed a motion for summary judgment. *See* Appellants' Brief, and Short Appendix *supra* note 132, at 2. However, by December 8, 2004, all of the grant money had been withdrawn from the grant account and distributed by Notre Dame, and the case still had not been decided. *See id.* Defendants Notre Dame and the DOE filed cross-motions for summary judgment on January 7, 2005, arguing that the case had become moot once the funds were depleted. *See id.*

141. *See Laskowski*, 2005 WL 1140694, at *1.

spent.[142] The district court agreed and dismissed the case as moot.[143] The plaintiffs' complaint had requested injunctive and declaratory relief to enjoin the DOE to withdraw approval of the grant, but the grant no longer existed.[144] Therefore, there was no longer a live case or controversy.[145]

In an attempt to keep their claim alive, the plaintiffs argued that although the grant funds were now gone, "the alleged Establishment Clause violation would be remedied if the DOE were ordered by the Court to recoup the Grant funds."[146] The plaintiffs requested this relief under their "general prayer for 'all other proper relief.'"[147] The district court refused to grant this remedy, reasoning that "such a prayer does not constitute a monetary damages claim. While courts have held that a demand for money damages may save a claim from being moot, Plaintiffs' claim for recoupment is not such a form of relief."[148] Further, the district court found no case law to

142. *See id.*

143. *See id.* The court reasoned: "Under Article III, 'cases that do not involve actual, ongoing controversies are moot and must be dismissed for lack of jurisdiction.'" *Id.* (quoting Wis. Right to Life v. Schober, 366 F.3d 485, 490–91 (7th Cir. 2004)). This holding is unremarkable. Just as in *Bost*, *supra* Part II.F, the district court properly recognized that when a one-time contract between the Government and a grantee has expired, there is no longer a live case or controversy because the program has ended and will not again be resumed.

144. *See Laskowski*, 2005 WL 1140694, at *1.

145. *Id.* at *2. The district court also noted that the plaintiffs' request for injunctive relief against any *future* funding of the ACE program by the DOE was not ripe for review. *See id.* at *2 n.1. "[F]ederal courts do not, as a rule, enjoin conduct that has been discontinued with no real prospect that it will be repeated." *Id.* The parties had not submitted any evidence indicating that a similar grant would be sought or issued in the future. *Id.*

146. *Id.* at *2. The plaintiffs' claim was premised on the text of 34 C.F.R. § 74.72(a), which provides:

> The closeout of an award does not affect any of the following: (1) The right of the Secretary to disallow costs and recover funds on the basis of a later audit or other review. (2) The obligation of the recipient to return any funds due as a result of later refunds, corrections, or other transactions.

See Appellants' Brief and Short Appendix, *supra* note 132, at 35–36. The plaintiffs also relied on 34 C.F.R. § 74.73, which provides: "[a]ny funds paid to a recipient in excess of the amount to which the recipient is finally determined to be entitled under the terms and conditions of the award constitute a debt to the Federal Government." *See* Appellants' Brief and Short Appendix, *supra* note 132, at 36 (alteration in original). Finally, the Federal Claims Collection Act, at 31 U.S.C. § 3711(a), provides: "The head of an executive, judicial, or legislative agency—(1) shall try to collect a claim of the United States Government for money or property arising out of the activities of, or referred to, the agency." *See* Appellants' Brief and Short Appendix, *supra* note 132, at 36.

147. Appellants' Brief and Short Appendix, *supra* note 132, at 36.

148. *Laskowski*, 2005 WL 1140694, at *2. The district court further elaborated:

> Plaintiffs seek only a form of equitable relief by requesting that the Court order the DOE to recoup funds dispersed under the Grant, thereby restoring the funds to their rightful owner. "Damages," on the other hand, has a commonly understood meaning: it generally connotes payment in money for a plaintiff's losses caused by a defendant's breach of

support the plaintiffs' contention that such an equitable remedy could save their claim from being dismissed.[149]

B. Seventh Circuit Reversal

On appeal, the Seventh Circuit reversed the district court's holding.[150] Judge Richard Posner,[151] writing for the two-judge majority, agreed with the district court that the claim for injunctive relief was moot, but did not believe that this rendered the entire case moot.[152] The panel majority reasoned that the plaintiffs, as federal taxpayers, were injured if the expenditure by the Secretary of Education was indeed made in violation of the Establishment Clause.[153] The expenditure itself was a sufficient injury for the plaintiffs to have taxpayer standing in federal court.[154] Judge Posner explained that "the plaintiffs' case would be moot only if the district court could make no order that would compensate them in whole or in part for the injury consisting of the improper expenditure."[155]

Judge Posner admitted that "insofar as the money has been spent for forbidden purposes, say to indoctrinate teachers or students in Catholic dogma, that injury cannot be rectified."[156] However, *the depletion of the Federal Treasury* could be rectified by restoring the amount of the grant to

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duty, and is different from equitable restitution.

Id.

149. *See id.* The district court's dismissal of the case was proper in light of the Supreme Court case *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69–72 (1997), which held that a plaintiff could not revive her case that originally sought injunctive relief, and which had been mooted by changed circumstances, by later adding a claim for nominal damages. *See infra* notes 231–38.

150. The case was heard by a three-judge panel consisting of Judges Posner, Evans, and Sykes. *See* Laskowski v. Spellings, 443 F.3d 930, 933 (7th Cir. 2006), *vacated and remanded sub nom.* Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007).

151. Judge Posner has been described as "the most prominent legal philosopher currently on the federal bench, including the Supreme Court." Dahlia Lithwick, *Richard Posner: A Human Pentium Processor Has Been Assigned to Settle the Microsoft Case*, SLATE, Nov. 24, 1999, http://www.slate.com/id/56526.

152. *Laskowski*, 443 F.3d at 933.

153. *Id.*

154. *See id.* Judge Posner did not cite to *Flast* in his opinion allowing taxpayer standing, but only cited to *Freedom from Religion Foundation, Inc. v. Chao*, 433 F.3d 989, 991-92 (7th Cir. 2006), a Seventh Circuit opinion written four months earlier by Judge Posner himself. *Chao* was subsequently reversed by the Supreme Court in *Hein v. Freedom from Religion Foundation, Inc.*, 127 S. Ct. 2553 (2007). *See supra* Part II.A.4.

155. *Chao*, 433 F.3d at 933–34. Interestingly, Judge Posner did not cite any authority for this narrow definition of mootness. If this is the true definition of mootness, however, it would be difficult to conceive of any situations where a case *could* be declared moot. *See infra* notes 228–30 and accompanying text.

156. *Laskowski*, 443 F.3d at 934. This is the Psychic Injury described by Justice Scalia in *Hein*, 127 S. Ct. at 2574 (Scalia, J., concurring).

the U.S. Treasury.[157] This "partial" relief would suffice to avert a finding of mootness.[158] The panel majority could think of no reason why such relief should not be awarded, because "[r]estitution is a standard remedy and one ordered in public-law as well as private-law cases."[159]

At the district court level, the plaintiffs requested that the court order the DOE to recoup the grant funds from Notre Dame.[160] Under the Code of Federal Regulations, the Secretary of the DOE has the authority to seek repayment of grant funds which were diverted to sectarian purposes in violation of the Establishment Clause.[161] The Seventh Circuit rejected the plaintiffs' requested form of the remedy because "courts are not authorized to review [the DOE's] decision not to take an enforcement action; such decisions are within the absolute discretion of the enforcement agency [DOE]."[162]

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157. *See Laskowski*, 443 F.3d at 934. This is the Wallet Injury, which Justice Scalia explains is not sufficient to confer standing under *Flast*. *See Hein*, 127 S. Ct. at 2574 (Scalia, J., concurring). It is not surprising that Judge Posner ruled in this way. He has been described as "the high prophet of 'law and economics,' a school of thought that derives legal principles from economic analysis . . . ." *See* Lithwick, *supra* note 151. The harm of religious indoctrination—the Psychic Injury—cannot be remedied in this situation, but from a purely economic standpoint, forcing Notre Dame to give money to the Federal Treasury in the amount of the original grant effectively "cancels out" the grant, making it as if the grant monies had never gone to fund religion in the first place. However, here the plaintiffs argued that the government impermissibly advanced religion by *failing to monitor* Notre Dame's expenditures. *See supra* note 146 and accompanying text. Forcing Notre Dame to give money to the Treasury in the amount of the original grant will not cure the harm alleged: that the government did not keep close enough tabs on the money after it was given to Notre Dame.

158. *See Laskowski*, 443 F.3d at 934.

159. *Id.* In dissent, however, Judge Sykes criticized this point, noting that the two cases Judge Posner cites for this proposition (Wyandotte Transp. Co. v. United States, 389 U.S. 191, 203–05 (1967), and United States v. P/B STCO 213, 756 F.2d 364, 374 (5th Cir. 1985)):

> [I]nvolved suits by the United States to recover costs incurred by the federal government to remediate a private party's violation of a statutory environmental clean-up duty . . . . These cases do not support the majority's theory that an individual federal taxpayer can pursue a restitutionary remedy against a private party for repayment of the Treasury in a lawsuit alleging an Establishment Clause violation by the government.

Laskowski, 443 F.3d at 944 (Sykes, J., dissenting). Indeed, the fact that the plaintiff in the cited cases was the Government itself, whereas the plaintiffs here are taxpayers, makes a huge difference in whether restitution should be allowed. *See infra* Part V.G.

160. *See supra* note 146 and accompanying text.

161. *See supra* note 146 and accompanying text; *see also Laskowski*, 443 F.3d at 934.

162. *See Laskowski*, 443 F.3d at 934. Echoing separation of powers concerns, Judge Posner reasoned: "[o]therwise courts would take over the prosecutorial function, making decisions, well outside judicial competence, about the best allocation of limited enforcement resources." *Id.* Judge Posner did not explain, however, how ordering Notre Dame to return the funds is any less "outside judicial competence" than ordering the DOE to recoup the funds.

Instead, the majority imposed a new remedy: "[i]f the plaintiffs prevail on the merits, the district court can simply order Notre Dame to return the money to the treasury."[163] As a private entity, Notre Dame could not violate the Establishment Clause; thus this new remedy did not require any wrongdoing on the defendant's part, but was "like a case of money received by mistake and ordered to be returned to the rightful owner."[164] Although this form of relief *was never requested by the plaintiffs*, the majority explained that the plaintiffs did make clear at the district court level that they wanted the grant money returned to the U.S. Treasury.[165] That the plaintiffs originally wished for "the funnel to be an order to the Secretary of Education" was "merely a detail."[166] Judge Posner cited Rule 54(c) of the Federal Rules of Civil Procedure for the proposition that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings."[167] This rule is necessary because "in the course of a litigation circumstances may change and what initially seemed adequate relief may cease to be so."[168]

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163. *Id.*

164. *Id.* at 934–935. Although Judge Posner's "money by mistake" metaphor lends support to his new remedy, there is no "mistake" here. Congress appropriated funds, which were then distributed by the DOE pursuant to a statutory scheme which provided that Notre Dame could not spend the money on religious purposes. The DOE investigated, and concluded that Notre Dame did not spend the money on religion. *See id.* at 936–37. The plaintiffs' only claim is that the government did not sufficiently monitor Notre Dame's use of the funds.

165. *Id.* at 935.

166. *Id.* The majority continued:

> These plaintiffs are asking that the district court order Notre Dame to repay the U.S. Treasury. Originally they wanted the district court to order the Secretary of Education to order Notre Dame to repay the U.S. Treasury. Now they are cutting out the middleman. The change in the form of relief sought has no practical significance.

Id.

167. *Id.* (quoting FED. R. CIV. P. 54(c)). It should be noted, however, that the federal rule should not be read so expansively as to violate Article III of the Constitution, which provides that the courts do not have jurisdiction over moot cases. *See supra* Part II.B. In *Fox v. Board of Trustees of State University of New York*, 42 F.3d 135 (1994), the Second Circuit refused to use Rule 54(c) to allow a plaintiff to add a claim for nominal damages to an otherwise mooted claim for injunctive relief. The court stated: "We are especially reluctant in these circumstances to read a damages claim into the Complaint's boilerplate prayer for 'such other relief as the Court deems just and proper' . . . ." *Id.* at 141. The court noted that, as in *Laskowski*, "there is no 'final judgment' for Plaintiffs in this case upon which the rule may operate." *Id.* at 142. The court concluded that there was "no basis to allow a belated claim for damages 'to breathe life into a moribund dispute.'" *Id.*

168. *Laskowski*, 443 F.3d at 935. Judge Posner recognized that it might seem unfair to seek such restitution from a party that is not the alleged wrongdoer, and which became a party to the lawsuit on its own motion. *See id.* He noted, however, that under the plaintiffs' original theory of the case, before Notre Dame was a party, the court would have ordered the Secretary of Education to force Notre Dame to pay back the funds. *See id.* at 935–36. Thus, after Notre Dame became a party, the "natural remedy" became the order of restitution against Notre Dame directly, eliminating the need for the court to order the Secretary of Education to recoup the funds. *See id.* at 936.

Judge Posner also recognized that there is a defense to this form of restitution: "[t]he recipient of the money sought to be recovered may not have known or have had reason to know that it was receiving money by mistake, and may have relied to its detriment on its honest and reasonable belief that it was legally entitled to the money."[169] Judge Posner noted that Notre Dame did rely to its detriment when it gave the money away.[170] Whether Notre Dame's reliance was reasonable, however, was a separate question to be decided by the district court on remand—if it determined there was in fact an Establishment Clause violation.[171] Thus, if Notre Dame "was merely an innocent conduit, neither knowing nor having reason to know that it was receiving an unlawful grant, it would not have to make restitution."[172]

The final issue the majority addressed was the interpretation of the Supreme Court cases concerning restitution in the Establishment Clause context. In its appellate brief, Notre Dame cited *Roemer* and *Lemon II* for the proposition that courts cannot order the recoupment remedy sought in this case.[173] Notre Dame pointed out that in *Roemer*, "the Court held that, '[a]s for the protection of substantive constitutional rights, the separation of church and state may well be better served by not putting the State . . . in the position of a judgment creditor of the [religious] colleges.'"[174] Judge Posner, however, described *Lemon II* and *Roemer* as "rather tortured opinions (neither of which commanded a majority)," and stated that in those two cases, the ground for the decision not to order restitution was based on the religious institutions' reasonable reliance on the grant's being legal.[175] Therefore, according to Judge Posner, these two cases did not hold that restitution is never a proper Establishment Clause remedy, but held that in

169. *Id.*

170. *Id.*

171. *See id.* at 936, 939.

172. *Id.* at 936 (citing Fidelity Nat'l Title Ins. Co. v. Howard Sav. Bank, 436 F.3d 836, 840 (7th Cir. 2006)); *see also* DOBBS, *supra* note 81, § 4.6, at 656–58. "Reasonable reliance . . . is a recognized defense to a suit for restitution against someone who is not himself a wrongdoer and who innocently received and spent money to which it turned out he had no right." *Laskowski*, 443 F.3d at 936. Although this rule sounds fair, in application it can have unduly harsh results. *See infra* Part IV.

173. *See Laskowski*, 443 F.3d at 936; *see also* Brief of Defendant-Intervenor-Appellee, *supra* note 130, at 28 ("[A]ny order to seek recoupment would exceed the Court's remedial authority.").

174. Brief of Defendant-Intervenor-Appellee, *supra* note 130, at 28 (alteration in original) (quoting Roemer v. Bd. of Pub. Works of Md., 426 U.S. 736, 767 n.23 (1976)).

175. *See Laskowski*, 443 F.3d at 936.

some cases the defense of reasonable reliance will "come[] into play after liability has been established."[176]

C. *Judge Sykes's Dissenting Opinion*

Judge Diane Sykes dissented, arguing that the case was moot, and that "[t]he majority keeps it alive by declaring the availability of a form of restitutionary relief that was not sought by the plaintiff taxpayers and is inconsistent with the doctrine of taxpayer standing under *Flast v. Cohen* . . . ."[177] Judge Sykes also explained that the majority impermissibly imported the private law concept of restitution into "the public law realm of Establishment Clause litigation, vesting taxpayers with a unique sort of qui tam-like authority to sue private parties for reimbursement of the Treasury when the government is alleged to have committed an Establishment Clause violation."[178] Judge Sykes concluded that the courts are without the authority to grant meaningful relief, and that the case should be dismissed as moot.[179]

D. *Denial of Rehearing and Petition for Certiorari*

The *Laskowski* defendants petitioned for an en banc rehearing of the case, but the Seventh Circuit denied the petition, affirming its prior decision.[180] Notre Dame filed a petition for certiorari to the Supreme Court, which was granted on June 29, 2007, following the Court's decision in *Hein*.[181] The Court vacated the Seventh Circuit's opinion, and remanded it

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176. *Id.* It is noteworthy, however, that the question addressed in *Lemon II* was fundamentally different from the *Laskowski* issues. *See supra* Part II.C.1. In *Roemer*, however, the issue *was* similar to the one here; namely, whether a grantee may be forced to pay funds *back to the government* if such funds were dispersed under an allegedly unconstitutional statute. *See supra* Part II.D. Although *Roemer* does suggest that recoupment might be awarded, it is only discussed in dicta in a footnote, and thus is not determinative of the issue. *See supra* Part II.D.

177. *Laskowski*, 443 F.3d at 939 (Sykes, J., dissenting). Judge Sykes continued: "[t]he Supreme Court has steadfastly refused to expand *Flast* and has never recognized private party repayment to the Treasury as an appropriate remedy for an Establishment Clause violation in a suit based on taxpayer standing." *Id.*

178. *Id.*

179. *Id.* at 946.

180. *See* Laskowski v. Spellings, 456 F.3d 702, 703 (7th Cir. 2006). The court also made two clarifying points. First, although Notre Dame may be liable for restitution of the funds it redistributed to other universities, it may have a defense if it did not know, or have reason to know, that it received the money "by mistake." *See id.* at 703–04. Second, the court emphasized that the plaintiffs' claim was not that Congress may never make grants to religious institutions, but that Congress "may not give it without imposing conditions that prevent the use of the money for religious rather than secular purposes." *Id.* at 704. The panel also clarified that the question to be determined on remand is "[w]hether appropriate conditions were imposed by the Secretary of Education and were properly observed or implemented by Notre Dame . . . ." *Id.*

181. Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007).

for reconsideration in light of *Hein*.[182] Although it is not yet clear how the Seventh Circuit will decide *Laskowski* on remand,[183] it is clear that *Laskowski*'s novel remedy will be popping up in other circuits around the country, as it has in the next case.

IV. APPLICATION OF THE RECOUPMENT REMEDY: *AMERICANS UNITED FOR SEPARATION OF CHURCH & STATE V. PRISON FELLOWSHIP MINISTRIES*

On June 2, 2006—less than two months after the Seventh Circuit issued its opinion in *Laskowski*—the recoupment remedy was actually ordered by a district court judge within the neighboring Eighth Circuit.[184] Although the *Laskowski* opinion effectively gave life to the recoupment remedy, this district court in Iowa was the first to actually order recoupment in the Establishment Clause context.[185] In *Americans United for Separation of Church & State v. Prison Fellowship Ministries*,[186] taxpayer plaintiffs challenged the Iowa Department of Corrections' funding of a "values-based pre-release" prison rehabilitation program ("InnerChange"), as "impermissibly advanc[ing] religion in violation of the Establishment Clause of the First Amendment."[187] The district court found that the relationship between the state of Iowa and Prison Fellowship Ministries ("PFM") violated the Establishment Clause.[188] The court cited *Laskowski* for the propositions that "'[r]estitution is among the remedies that a federal court can order for a violation of federal law'" and that "'there is no per se rule

182. *Id.*

183. One pair of commentators has suggested that the Seventh Circuit's decision in *Laskowski* "seemed . . . to be a stretch, and [would] not be surprised if the Seventh Circuit now orders dismissal of the case on the ground that the taxpayers lack standing to pursue it." Ira C. Lupu & Robert W. Tuttle, *Jay Hein, Director of the White House Office of Faith-Based and Community Initiatives v. Freedom from Religion Foundation, Inc.*, at n.15, ROUNDTABLE ON RELIGION & SOC. WELFARE POL'Y, July 2, 2007, http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=60.

184. *See* Ams. United for Separation of Church & State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862, 941 (S.D. Iowa 2006), *judgment aff'd in part and rev'd in part*, 509 F.3d 406 (8th Cir. 2007).

185. *See* Ira C. Lupu & Robert W. Tuttle, *Americans United for Separation of Church and State (and others) v. Prison Fellowship Ministries (and others)*, ROUNDTABLE ON RELIGION & SOC. WELFARE POL'Y, June 13, 2006, http://religionandsocialpolicy.org/legal/legal_update_print.cfm?id=49 ("In the absence of a contractual provision obligating a religious organization to make such a repayment if a program is held unlawful, no court (to our knowledge) has ever ordered a faith-based group to repay monies to the state or federal government after a finding that the payment was in violation of the Establishment Clause.").

186. 432 F. Supp. 2d at 862.

187. *See id.* at 864–65.

188. *See id.* at 934.

that the recipient of illegal funds who has spent them cannot be forced to repay them, either in establishment clause cases or in any other class of cases.'"[189]

The court acknowledged that whether recoupment was proper in this case was a difficult question,[190] but applied *Laskowski*'s reasoning to determine whether PFM reasonably relied on its belief that the government aid was legal, as a defense to recoupment.[191] The court found that PFM's reliance on the state funding of the InnerChange program was not reasonable for four reasons: (1) "the severe nature of the violation";[192] (2) "the primary effect of the contract between the state and InnerChange was on-going";[193] (3) "the financial burden to InnerChange and Prison Fellowship will not be insignificant, but it will not be unmanageable in light of their annual revenue";[194] and (4) "the [high] degree of knowledge of the Defendants about the risk associated with the program."[195] The court held that these factors outweighed any reliance that PFM had on the government funding in this case, and ordered the defendants to repay *the full amount of state funds which had been awarded*—over $1.5 million.[196]

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189. *Id.* at 938 (quoting Laskowski v. Spellings, 443 F.3d 930, 935–36 (7th Cir. 2006)); *see also* IRA C. LUPU & ROBERT W. TUTTLE, ROCKEFELLER INSTITUTE OF GOVERNMENT, THE STATE OF THE LAW 2006: LEGAL DEVELOPMENTS AFFECTING GOVERNMENT PARTNERSHIPS WITH FAITH-BASED ORGANIZATIONS 95, Dec. 2006, http://www.religionandsocialpolicy.org/docs/legal/reports/State_of_the_Law_2006.pdf ("In *Americans United* . . . Chief Judge Pratt relied explicitly on the 7th Circuit's opinion in *Laskowski* in support of his order that Prison Fellowship Ministries return monies wrongfully expended to the State of Iowa.").

190. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 938.

191. *See id.* at 938–41; *see also* LUPU & TUTTLE, *supra* note 189, at 45 ("Judge Posner's recent opinion for the Seventh Circuit in *Laskowski v. Spellings*, which Chief Judge Pratt cites, suggested precisely this sort of equitable calculation in deciding whether a repayment order might be appropriate in Establishment Clause litigation.").

192. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 939. The court explained that "[t]he violations in *Lemon II* and *Cathedral Academy* appear quaint next to the intentional choice by the state of Iowa and InnerChange to inculcate prisoners as a treatment for recidivist behavior." *Id.* Further, "[t]he level of religious indoctrination supported by state funds and other state support in this case, in comparison to other programs treated in the case law . . . is extraordinary." *Id.*

193. *Id.* The court described the primary effect to be "years of state endorsement of the religious message taught by InnerChange." *Id.*

194. *Id.* at 940. Because PFM admitted that InnerChange likely had the resources to fund its own program without state funds, the court reasoned that requiring recoupment would not be an "unmanageable" burden. *See id.* It does not appear, however, that the defendant's wealth (or lack of it) was discussed in *Laskowski* (or *Lemon II* and *Cathedral Academy*) as a factor to be considered in determining *whether the defendant's reliance on the grant was reasonable.* Therefore, the court's analysis here of the defendant's "annual revenue" is questionable, if not entirely inappropriate. *See id.*

195. *Id.* at 941. The defendants had "retained experienced, knowledgeable legal counsel that should have been aware of the constitutional risks associated with state funding of InnerChange." *Id.* at 940. Moreover, it was shown that InnerChange had previously received a memorandum from the California Department of Corrections explaining that the agency could not fund the InnerChange program in California prisons because of Establishment Clause limitations. *Id.*

196. *See id.* at 941. It is truly remarkable that the court ordered recoupment of the entire amount

This case was appealed to the Eight Circuit, which held that the funding at issue did violate the Establishment Clause, but that the district court's recoupment remedy was an abuse of discretion.[197] The court found that several factors the district court failed to consider, in their totality, invalidated the recoupment remedy: (1) "specific statutes, presumptively valid, authorized the InnerChange funding"; (2) there was "no finding of bad faith by the Iowa legislature and governor" in permitting the funding; (3) "the legislature stopped the funding after the district court enjoined it," further indicating good faith; (4) the defendants did not have clear notice under case law that the program was "plainly unlawful"; and (5) state prison officials testified "that the program was beneficial and the state received much more value than it paid for."[198] In addition, the lower court's consideration of PFM's financial ability to repay the funds was insufficient because "it depends solely on the defendant's wealth and deters financially sound organizations from contracting with the government."[199] Finally, the court noted that the plaintiffs failed to seek injunctive relief to prevent further payments to PFM while the litigation was pending, which reinforced PFM's reliance on those payments.[200] However, recoupment was proper for any funds PFM received *after* the district court declared InnerChange unconstitutional.[201]

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of funds the state had paid since the program's inception. The court apparently believed that every dollar given to PFM was spent in aid of religion (which is nearly impossible), and that the state received no beneficial non-religious services from the program. The scope of this award suggests that the recoupment remedy has the potential to work harsh injustice against grantees who have relied on government funding, and who, after recoupment, will have provided valuable services to the government for free. On appeal, counsel for the State of Iowa argued that the restitution awarded was "an excessive remedy," and explained that the State did not ask for the money back because it believed it got value in exchange for the $3.45 which was given to PFM daily. *See* Audio Recording (MP3): Oral Argument, Americans United v. Prison Fellowship Ministries (06-2741) (Feb. 13, 2007), http://www.ca8.uscourts.gov/oralargs/oaFrame.html (click "Case Number" hyperlink in left column; then enter "06-2741" in "Enter Your Case Number" box). Counsel for the Plaintiffs-Appellees (Americans United), on the other hand, argued that the recoupment remedy was proper because the PFM program provided no value to the State. *See id.*

197. Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc., 509 F.3d 406, 424-28 (8th Cir. 2007). The unanimous panel consisted of Justice Sandra Day O'Connor (sitting by designation), Judge Wollman, and Judge Benton, who authored the opinion. *Id.* at 413.

198. *Id.* at 427-28.

199. *Id.* at 428.

200. *Id.* (citing Lemon v. Kurtzman [*Lemon II*], 411 U.S. 192, 204 (1973)).

201. *Id.*

V. ANALYSIS: IS RECOUPMENT A PROPER REMEDY?

A. Two Categories of Statutes

Two main types of statutory schemes are challenged in the cases discussed above. First, there are "reimbursement statutes," whereby the government promises to pay a certain sum of money on a regular basis, to reimburse a private school (or other charitable organization) for certain services provided during that time period. *Lemon II* and *Cathedral Academy* fall into this category.[202] The second category of statutes is "up-front grants," where the government gives to a school or organization a grant containing restrictions on how the money should and should not be spent. *Roemer*, *Bost*, and *Laskowski* each fall into this category.[203]

In these challenges to government spending, the time period within which the suit is filed is crucial for purposes of standing and mootness. If the challenged government grant is part of an ongoing or recurring program, the timing of filing the suit is less crucial, because the ongoing nature of the program prevents the case from becoming moot. For example, in *Lemon II*, *Roemer*, *Cathedral Academy*, and *Prison Fellowship Ministries*, the grant funds were part of a statutory scheme by which the government regularly gave money to the private organization for certain services rendered during a set period of time.[204]

However, if the challenged government spending is part of a one-time contract or grant that does not recur, taxpayer plaintiffs (prior to *Laskowski*) would have to file suit as early as possible to prevent the case from becoming moot once the program ends and the funds are spent.[205] For example, in *Bost* the suit was dismissed as moot because it was not filed until after the grant period had expired.[206] *Laskowski* changed this rule by allowing the possibility of recoupment to keep a case from becoming

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202. *See supra* Parts II.C.1, II.E.

203. *See supra* Parts II.D, II.F, III.

204. *See supra* Parts II.C.1, II.D–E, IV.

205. Judge Posner aptly illustrated the difference between "recurring" grants and "one-time" grants for purpose of mootness analysis:

> If Congress created a continuing program of expenditures challenged as violating the establishment clause . . . say that consisted of annual $1 million grants to the Scottish Episcopal Church to pay the salaries of its ministers—it could be enjoined and in that way injury averted. But suppose Congress by an amendment to an appropriation bill earmarked $100 million for the Scottish Episcopal Church and the money was disbursed by the Department of the Treasury the following day. An injunction against the disbursement would come too late to provide any relief to the complaining taxpayers.

Laskowski v. Spellings, 443 F.3d 930, 934 (7th Cir. 2006), *vacated and remanded sub nom.* Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007).

206. *See supra* note 122 and accompanying text.

moot.[207] If *Laskowski*'s remedy is the proper way to monitor government granting schemes, such suits will be free from mootness concerns in the future. But if it is not proper, one-time grants can only be challenged during the grant period, or will become moot.

B. Ongoing and Recurring Reimbursement Statutes

Mootness will not be an issue when the statutory framework challenged as violative of the Establishment Clause provides for government reimbursement to a school or organization on a regular and on-going basis.[208] As in *Lemon II*, *Cathedral Academy*, and *Prison Fellowship Ministries*, there is a live case or controversy at issue concerning the program, which is continuing on indefinitely.[209] Plaintiffs challenging such a recurring program will likely seek injunctive relief to prevent future government monies from going to the school or organization.[210] Where injunctive relief is sought as a remedy, there will not be a standing problem, as the case will fit into *Flast*'s exception for taxpayer standing.[211] If an ongoing reimbursement statute or contract is found to be unconstitutional, the court must then decide whether one final payment should be allowed, because the grantee has likely been providing services in reliance on the promise of reimbursement at the end of that time period.[212] In this situation, the equitable balancing test set forth in *Lemon II* will govern the court's analysis.[213]

It is also possible that in a case challenging a reimbursement scheme, the plaintiffs will assert the claim that the *Lemon* plaintiffs did not: a claim for recoupment of all the funds previously disbursed under the contract.[214] If this remedy is sought, the court would not apply the same test as above, which dealt only "with the legal issue of retroactivity," and not with whether "restitution from a private party defendant is an available remedy in a taxpayer suit for an Establishment Clause violation . . . ."[215] Whether the

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207. *See supra* note 158 and accompanying text.

208. *See supra* Part II.B.

209. *See supra* Parts II.C.1, II.E, IV.

210. Injunctive relief is the standard remedy in Establishment Clause suits. *See* LUPU & TUTTLE, *supra* note 80.

211. *See supra* Part II.A.1.

212. This is the question the Court confronted in *Lemon II* and *Cathedral Academy*. *See supra* Parts II.C.1, II.E.

213. *See supra* note 106 and accompanying text.

214. *See supra* note 89.

215. Laskowski v. Spellings, 443 F.3d 930, 946 (7th Cir. 2006) (Sykes, J., dissenting), *vacated*

separate claim for recoupment of the expended funds is permissible will depend, first, on whether the plaintiffs have standing to assert such a claim, and second, whether such a restitutionary claim is even proper in the constitutional context. As discussed below, it appears that both of these inquires must be answered in the negative.[216]

If, as in *Roemer*, a recurring up-front grant scheme is at issue, the plaintiffs will likely seek injunctive relief to prevent future grants from occurring, and also will seek recoupment of the grant funds which have already been expended.[217] The claim for injunctive relief will not face mootness or standing problems because there is still a live controversy as to the future grants.[218] However, the claim for recoupment is separate, and must also satisfy the standing and mootness requirements.[219] Once again, the issue is whether recoupment as envisioned in *Laskowski* is a proper remedy.[220]

C. *One-time Grants and Contracts:* Laskowski *and The Problem of Mootness*

The first hurdle that a suit challenging a one-time grant or contract must overcome is avoiding mootness. The first step plaintiffs must take when challenging a one-time grant is to file for a preliminary injunction to prevent the grantee from spending the money disbursed under a constitutionally-suspect statutory scheme.[221] This was not done in *Laskowski*,[222] and the case became moot during the course of the litigation when the grant period

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and remanded sub nom. Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007).

216. *See infra* Parts V.D–E, VI.

217. *See supra* note 101 and accompanying text.

218. *See supra* notes 21–24 and accompanying text; *see also supra* Part II.B.

219. *See supra* notes 21–24 and accompanying text; *see also supra* Part II.B.

220. Although the dicta in *Roemer* suggests that the *Lemon II* balancing test might be applicable to determine whether recoupment is a proper remedy in a given case, *Roemer* was only a three-Justice plurality opinion. *See* Roemer v. Bd. of Pub. Works of Md., 426 U.S. 736, 738, 767 n.23 (1976). Moreover, *Roemer*'s discussion of the recoupment remedy was relegated to one footnote. *See id.* at 767 n.23; *see also Laskowski*, 443 F.3d at 945 (Sykes, J., dissenting) ("The taxpayers' claim that the colleges must return amounts already paid was thus rejected in *Roemer*; nothing in the plurality's footnote can be read to suggest that ordering private grant recipients to refund spent grant money is an ordinary and accepted remedy in Establishment Clause cases.").

221. *See supra* note 210. It would be extremely preferable for the plaintiffs to prevent the money from being disbursed, rather than to try later to collect the money that has been disbursed and spent. *See supra* notes 200, 205 and accompanying text; *see also* Lemon v. Kurtzman [*Lemon II*], 411 U.S. 192, 204 (1973) (noting that the "tactical choice not to press for interim injunctive suspension of payments or contracts during the pendency of the *Lemon I* litigation may well have encouraged the appellee schools to incur detriments in reliance upon reimbursement by the State") (emphasis added).

222. *See* Petition for Writ of Certiorari at 5, University of Notre Dame v. Laskowski, 127 S. Ct. 3051 (No. 06-582), 2006 WL 3043822.

expired and the funds had been spent, because there was no longer a live controversy as to the appropriation's constitutionality.[223]

The Seventh Circuit found, however, that cases like *Laskowski* will not be moot when the plaintiffs have requested recoupment of the grant funds to the Federal Treasury.[224] According to Judge Posner, "the plaintiffs' case would be moot only if the district court could make no order that would compensate them in whole or in part for the injury consisting of the improper expenditure."[225] The plaintiffs' injury—"the depletion of the federal treasury by the amount of the grant"—could then be rectified "by the restoration of the money to the U.S. Treasury," a form of relief that purportedly saves the claim from being moot.[226]

There is a glaring problem with Judge Posner's narrow definition of mootness: there is no feasible place to draw the line between cases which are moot and those which are not—no matter how long ago the challenged action occurred. Under Judge Posner's statement of the rule, the

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223. *See supra* Part III.A. Although there was a possibility that the government *could* in the future make the exact same appropriation to be distributed to Notre Dame through the DOE, "federal courts do not, as a rule, enjoin conduct that has been discontinued with no real prospect that it will be repeated." Laskowski v. Spellings, No. 1:03-CV-1810 LJM-WTL, 2005 WL 1140694, at *2 n.1 (S.D. Ind. May 13, 2005), *vacated and remanded*, 443 F.3d 930 (2006), *vacated and remanded sub nom.* Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007). Judge Sykes agreed with the district court's dismissal for mootness, arguing that "the grant appropriation expired by its own terms. Because it was a one-time only congressional earmark, now expired, and Notre Dame had received and either spent or disbursed the entire grant amount . . . an ongoing alleged constitutional violation no longer existed." *Laskowski*, 443 F.3d at 940 (Sykes, J., dissenting).

224. *See supra* Part III.B. But in *Laskowski*, the plaintiffs did not request such relief—it was instead "*sua sponte* injected" into the case by the Seventh Circuit majority. *See Laskowski*, 443 F.3d at 941 n.1 (Sykes, J., dissenting).

225. *Laskowski*, 443 F.3d at 933–34.

226. *Id.* at 934. In disagreement, Judge Sykes pointed out that the plaintiff taxpayers had not made any restitution-based claim in their complaint, at the district court level, or on appeal, and that any such claim was therefore waived. *See id.* at 941 (Sykes, J., dissenting). She noted, "[i]t is well-settled that when a plaintiff challenges the validity of a statute and seeks *only* prospective injunctive relief, the repeal or expiration of the statute 'ends the ongoing controversy.'" *Id.* at 940. Since the restitutionary claim was not actually sought by the plaintiffs, she believes it is improper for a judge to "declar[e] the existence of a novel compensatory remedy" to prevent the case from being moot. *Id.* at 941. Moreover, such a "judicial act of significant import . . . should not be undertaken in the absence of an actual claim for this form of relief and full briefing by the parties." *Id.* It appears that even if recoupment were deemed a legitimate remedy, Judge Sykes would still hold *this* case to be moot because the plaintiffs did not request such relief here, nor did they brief the court on such issues. On the other hand, Judge Posner cited Rule 54(c) of the Federal Rules of Civil Procedure for the proposition that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." *Id.* at 935 (majority opinion). Judge Sykes countered that the Rules of Procedure do not allow judges to "invent a new remedy in favor of plaintiffs who have not requested it in a case that is otherwise moot." *Id.* at 941 n.1 (Sykes, J., dissenting).

constitutionality of any past action will never be a moot issue, as long as there is *some* remedy that will compensate the plaintiffs "in whole or in part" for their alleged injury. This rule could lead to preposterous results. For example, if a taxpayer challenges a one-time grant that was made to a religious school twenty years ago, the claim would not be moot because the court could still order the school to pay the money back to the treasury.[227] Moreover, this narrow rule would turn Supreme Court precedent on its head; if the mootness doctrine is as permissive as Judge Posner suggests, practically no cases would ever be moot.[228] There is no sensible place to draw the line between cases which are moot and those which are not, except for the place where precedent has drawn the line: when a statute is expired, the courts do not reach back to pronounce on the former statute's validity.[229]

The Seventh Circuit's imposition of the recoupment remedy in *Laskowski* does not comport with Supreme Court precedent. In *Arizonans for Official English v. Arizona*, a plaintiff's section 1983 claim for prospective relief against her employer, the State of Arizona, was mooted when she left her job while the case was on appeal.[230] The Ninth Circuit, however, refused to dismiss the case as moot, and "held that a plea for nominal damages could be read into [the plaintiff's] complaint to save the case, and therefore pressed on to an ultimate decision."[231] The Supreme

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227. Such a result would be in direct contravention of the Supreme Court's rule that federal courts "are not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong." Spencer v. Kemna, 523 U.S. 1, 18 (1998).

228. *See* Reply Brief for Petitioner at 9, Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007) (No. 06-582), 2006 WL 3725139. ("[N]o Establishment Clause case would *ever* be moot if the court of appeals' decision stands.") (alteration in original). For example, if a school choice voucher program, which was discontinued years ago, is challenged now, is the case not moot because the court may force the parents to give all the voucher money back to the government? This would be inequitable, considering that the money has long been expended and the harm of indoctrination of the students already occurred and is not ongoing. Forcing the parents to give the voucher money back would not change the fact that the government had sponsored religion through an allegedly unconstitutional program.

229. Indeed, if the courts did begin pronouncing on the constitutionality of expired statutes, they would be clearly violating the "case or controversy" requirement of Article III and the long-recognized ban on advisory opinions. Even an advisory opinion concerning a dead controversy could give plaintiffs relief "in part" by easing their conscience. However, such "relief" would never pass scrutiny under the Supreme Court's standards for mootness.

230. *See* Arizonans for Official English v. Arizona, 520 U.S. 43, 72 (1997). In 1988, the plaintiff brought a section 1983 civil rights action against the State of Arizona. *See id.* at 49–50. The district court ruled in the plaintiff's favor. *See id.* at 56. During the appeal, in 1990, the plaintiff left her job with the State, and "[h]er departure for a position in the private sector made her claim for prospective relief moot." *See id.* at 48.

231. *See id.* In response to the defendant's claim that the case was moot, the plaintiff suggested to the court the possibility of seeking nominal damages to keep the case alive. *See id.* at 68. The Ninth Circuit acknowledged that "[t]he plaintiff may no longer be affected by the [challenged] provision," but continued: "[her] constitutional claims may entitle her to an award of nominal damages." *See id.* at 60. Although the complaint had not expressly requested nominal damages, the court read the complaint's request for "all other relief that the Court deems just and proper under the

Court reversed, holding that "[t]he Ninth Circuit had no warrant to proceed as it did. The case had lost the essential elements of a justiciable controversy and should not have been retained for adjudication on the merits by the Court of Appeals."[232] The Court noted that "§ 1983 actions do not lie against a State," but the Ninth Circuit had awarded the nominal damages against the state of Arizona.[233] "Thus, the claim for relief the Ninth Circuit found sufficient to overcome mootness was nonexistent."[234] Similarly, the Seventh Circuit's attempt to prevent the *Laskowski* plaintiff's claim from becoming moot "could not genuinely revive the case."[235] Because restitutionary recoupment is not a constitutional remedy,[236] "the claim for relief the [Seventh] Circuit found sufficient to overcome mootness [in *Laskowski*] was nonexistent," and that court "had no warrant to proceed as it did."[237]

Not only must "recoupment" be a legitimate form of relief for constitutional harms, but the plaintiffs must have standing to assert such a claim (a consideration that the Seventh Circuit merely glossed over).[238] Judge Poser simply assumed that the plaintiffs had taxpayer standing.[239]

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circumstances" broadly to include nominal damages. *See id.*

232. *Id.* at 48.

233. *See id.* at 69.

234. *Id.*

235. *See id.* at 71; *see also* Fox v. Bd. of Trs. of State Univ. of N.Y., 42 F.3d 135, 141–42 (2d Cir. 1994) (disallowing plaintiff to add a claim for nominal damages to save an otherwise mooted claim for injunctive relief).

236. *See infra* Part V.

237. *See Arizonans*, 520 U.S. at 48, 69.

238. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 189 (2000) (The standard for mootness requires that "'[t]he requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'" (quoting *Arizonans*, 520 U.S. at 68 n.22); *see also* Laskowski v. Spellings, 443 F.3d 930, 946 (7th Cir. 2006) (Sykes, J., dissenting), *vacated and remanded sub nom.* Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007) ("The test for mootness is not an invitation to explore the outer limits of the court's creativity in fashioning a remedy. It is, rather, a practical legal inquiry: within the confines of the recognized causes of action and *remedies for which the plaintiff has standing*, can the court grant meaningful relief?") (emphasis added).

239. *See Laskowski*, 443 F.3d at 942 (Sykes, J., dissenting) ("Implicit in this holding [that the case is not moot] is a subsidiary one: that taxpayers have standing to sue a private federal grant recipient for restitution where the government is alleged to have committed an Establishment Clause violation in making or monitoring the grant. Taxpayer standing under *Flast* has never been understood to encompass such a claim."); *id.* at 943 ("The majority opinion does not directly address the standing question."). *But see* Respondent's Brief in Opposition to Writ of Certiorari at 1, University of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007) (No. 06-582), 2006 WL 3419826 ("[T]he real issue in this case is not whether there is taxpayer standing, but whether or not the case became moot after its filing for lack of a remedy.").

Even in cases where a challenge to a one-time grant is *not yet moot*—for example, if a three-year grant is being challenged during the first year[240]—the issues of standing and the general appropriateness of the remedy still must be addressed.

D. The Constitutional Requirement of Standing

Article III standing requires "at an irreducible minimum," that a plaintiff show (1) an injury-in-fact: "that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant"; (2) traceability: "that the injury fairly can be traced to the challenged action"; and (3) redressability: that the injury "is likely to be redressed by a favorable decision."[241] The standing inquiry is especially important in cases where "taxpayers seek 'to challenge laws of general application where their own injury is not distinct from that suffered in general by other taxpayers or citizens.'"[242]

Although *Flast v. Cohen* created a "narrow exception"[243] to *Frothingham v. Mellon*'s bar against taxpayer standing suits, *Valley Forge* emphasized that in taxpayer suits, the traditional requirements of injury-in-fact and redressability still must be met before standing is established.[244] Moreover, because plaintiffs "must demonstrate standing separately for each form of relief sought,"[245] if a suit is timely filed seeking injunctive relief under *Flast* to prevent the expenditures *and* recoupment of funds already spent, standing must be established separately for the recoupment remedy.[246]

E. Injury-In-Fact and Redressability

The Supreme Court recently explained that under *Flast v. Cohen*, "the 'injury' alleged in Establishment Clause challenges to federal spending [is] the very 'extract[ion] and spen[ding]' of 'tax money' in aid of religion alleged by a plaintiff."[247] In one-time grant cases like *Laskowski*, the injury

240. *See* LUPU & TUTTLE, *supra* note 189, at 95.

241. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982) (internal quotations and citations omitted). Traceability is not at issue here.

242. Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2562 (2007) (plurality opinion) (quoting ASARCO, Inc. v. Kadish, 490 U.S. 605, 613 (1989).

243. Bowen v. Kendrick, 487 U.S. 589, 618 (1988).

244. *See Valley Forge*, 454 U.S. at 488–90.

245. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 185 (2000).

246. *See, e.g.*, Reply Brief for Petitioner, *supra* note 228, at 8 ("Plaintiffs' standing to seek recoupment on behalf of the Government cannot be bootstrapped to their standing to seek a *Flast*-type injunction against ongoing congressional expenditures." (citing DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854, 1868 (2006))).

247. *Cuno*, 126 S. Ct. at 1865 (alterations in original) (quoting Flast v. Cohen, 392 U.S. 83, 106 (1968)).

is that "the money has been spent for forbidden purposes, say to indoctrinate teachers or students in Catholic dogma."[248] This is the Psychic Injury that is redressable under *Flast*.[249] Because this injury (government sponsorship of religion) has already occurred, its effects cannot be reversed or undone by a recoupment of funds to the Federal Treasury.[250] Nevertheless, Judge Posner contends that "[w]hat can be rectified . . . is the depletion of the federal treasury by the amount of the grant. It can be rectified simply by the restoration of the money to the U.S. Treasury."[251] Although such a remedy would make it *appear as if* the government funds had never aided religion, the truth is that the government money *was* spent in aid of religion, and the fiction of forcing a school or organization to return the funds simply cannot undo that harm.[252] Indeed, "it is a complete fiction to argue that an

248. Laskowski v. Spellings, 443 F.3d 930, 934 (7th Cir. 2006), *vacated and remanded sub nom.* Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007); *see also* Appellee University of Notre Dame's Brief and Supplemental Index at 19, Laskowski v. Spellings, 443 F.3d 930 (7th Cir. 2006) (No. 05-2749), 2005 WL 3739459 ("Returning money to government coffers in an amount equivalent to the alleged improper expenditure would not cure the past indoctrination or religious speech that Plaintiffs allege may have occurred because of improper monitoring.").

249. *See supra* notes 69–70 and accompanying text; *see also* Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2574 (2007) (Scalia, J., concurring) ("*Flast* and the cases following its teaching have invoked a peculiarly restricted version of Psychic Injury . . . .").

250. Judge Posner admitted that this injury cannot be rectified. *See Laskowski*, 443 F.3d at 934. The taxpayer plaintiffs argued, however, that the injury "can be remedied . . . by ordering that the taxpayer funds be returned to the federal treasury even after the expenditure has occurred. . . . [T]he injury is redressed because taxpayer money will not have been expended on the religious activity of the grant project." *See* Respondent's Brief in Opposition to Petition for Writ of Certiorari, *supra* note 239, at 8–9.

251. *Laskowski*, 443 F.3d at 934. In *Hein*, the Supreme Court recently rejected the taxpayers' claim that "having paid lawfully collected taxes into the Federal Treasury at some point, they [had] a continuing, legally cognizable interest in ensuring that those funds are not *used* by the Government in a way that violates the Constitution." *Hein*, 127 S. Ct. at 2563 (plurality opinion).

252. *See, e.g.*, Reply Brief for Petitioner, *supra* note 228, at 8–9 ("Any prior religious activity cannot be cured or undone by requiring Notre Dame to write a check for an amount equivalent to the federal grant. . . . The subsequent reimbursement will cure only the Treasury's financial injury; it will not somehow 'undo' the speech improperly purchased through public funds."). *Contra* LUPU & TUTTLE, *supra* note 189, at 93–94 ("Restitution of money already spent will cure the harm to taxpayers just as readily and fully as an injunction against future payment . . . . [O]nce the remedy is enforced, the government treasury will not be depleted by amounts that impermissibly support religion.").

The *Laskowski* plaintiffs point out that "[p]art of the evil to be avoided through the Establishment Clause is the public perception of government endorsement of religious activity." Respondent's Brief in Opposition, *supra* note 239, at 9 n.8 (citing County of Allegheny v. ACLU, 492 U.S. 573, 593–94 (1989)). Therefore, "if the government money is refunded, the perception of government endorsement of the religious activities of the ACE Replication program will be removed." *Id.* However, in cases such as *Laskowski*, where plaintiffs are seeking to compel recoupment of the funds, the government does not want the money back. A court order for

unconstitutional federal expenditure causes an individual federal taxpayer any measurable economic harm."[253] The recoupment remedy fails the standing requirement that it redress the constitutional injury alleged.

Judge Posner, however, contends that the injury of "the depletion of the federal treasury by the amount of the grant" can be redressed.[254] This injury, however, is the Wallet Injury described by Justice Scalia, which is not sufficient to confer standing.[255] According to *Frothingham v. Mellon*, taxpayers do not have an injury-in-fact when the government spends tax funds in a way with which they disagree, because taxpayers do not have an interest in the moneys of the Federal Treasury.[256] The *Flast* exception does not change this simple rule; *Flast* does not stand for the proposition that taxpayers have an interest in the Federal Treasury only when the Establishment Clause is at issue.[257] To the contrary, *Flast* stands on the reasoning that "*an injunction against the spending* would of course redress [the extraction and spending of funds in aid of religion], regardless of whether lawmakers would dispose of the savings in a way that would benefit the taxpayer-plaintiffs personally."[258] For the Seventh Circuit's recoupment remedy to satisfy the redressability requirement, it must be true that taxpayers have an interest in the Federal Treasury. However, "taxpayer standing under *Flast* is not premised upon injuries to the public fisc; taxpayers in these suits are not vindicating losses sustained by the

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recoupment essentially *forces* the government to accept the money. This cannot undo the public perception of government endorsement of religion, because the government still maintains that there was no Establishment Clause violation. Moreover, even if the "perception" of endorsement could be undone in this way, the fact that the endorsement actually occurred, as plaintiffs wish the court to hold, still cannot be undone. The best way plaintiffs can prevent the government's endorsement of religion is to file for a preliminary injunction, prospective relief that will prevent the harm from occurring at all.

253. *Hein*, 127 S. Ct. at 2559 (plurality opinion).

254. *Laskowski*, 443 F.3d at 934.

255. *See supra* note 157 and accompanying text.

256. *See* Frothingham v. Mellon, 262 U.S. 447, 487 (1923); *see also* Flast v. Cohen, 392 U.S. 83, 92 (1968); Doremus v. Bd. of Educ., 342 U.S. 429, 433 (1952) ("[T]he interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain and indirect" to support standing to challenge "their manner of expenditure."); DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854, 1862 (2006) (In "taxpayer challenges to expenditures that deplete the treasury, and to taxpayer challenges to so-called 'tax expenditures' . . . [s]tanding has been rejected in such cases because the alleged injury is not 'concrete and particularized,' but instead a grievance the taxpayer 'suffers in some indefinite way in common with people generally.'" (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992), and *Frothingham*, 262 U.S. at 488)).

257. For example, Notre Dame argued that "*Flast* does not provide some heightened interest in the federal fisc in Establishment Clause cases, nor does *Flast* suggest that the taxpayer has some separate, individual interest in the Treasury that could support standing after that religious injury has passed." Petition for Writ of Certiorari, *supra* note 222, at 14–15.

258. *Cuno*, 126 S. Ct. at 1865 (emphasis added).

Treasury."[259] Thus, there cannot be standing for the recoupment remedy, when it will not redress the plaintiffs' injury-in-fact.

F. The Proper Scope of Taxpayer Suits

Even if recoupment is interpreted as redressing the injury of government sponsorship of religion, there is still the question of whether such a remedy falls within the scope of *Flast v. Cohen*.[260] It is not clear whether taxpayer standing under *Flast* encompasses *only* claims for injunctive relief, or whether *Flast* may be read more broadly to include other remedies, such as recoupment. Although *Flast* does not state outright that taxpayer claims under the Establishment Clause are limited to injunctive relief only,[261] over the past forty years since *Flast* was decided, the Court has only entertained taxpayer claims for injunctive relief.[262] Moreover, the Supreme Court reiterated last term in *Cuno*, and this term in *Hein*, that *Flast* has a "narrow application in our precedent,"[263] which suggests that the Court might be inclined to limit *Flast* to claims for injunctive relief only.[264]

G. Parties Before the Court

Another problem with challenges to one-time grants that have already expired concerns the parties which may be properly brought before the

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259. *Laskowski*, 443 F.3d at 943 (Sykes, J., dissenting). The Court has held that even in the Establishment Clause context, taxpayers do not have a legally cognizable interest in the Federal Treasury. *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 485 n.20 (1982) (rejecting the plaintiffs' claim that, under the Establishment Clause, "the standing of a taxpayer is established by his 'continuing stake . . . in the disposition of the Treasury to which he has contributed his taxes'") (citation omitted).

260. In *Bost*, for example, the district court held that *Flast* only extended to suits for injunctive relief. *See supra* Part II.F.

261. In *Cuno*, for example, the Court described *Flast* as strictly limited to a claim "'that congressional action under the taxing and spending clause is in derogation of' the Establishment Clause." *Cuno*, 126 S. Ct. at 1864 (quoting *Flast*, 392 U.S. at 105–106).

262. *But see* LUPU & TUTTLE, *supra* note 189, at 93 ("On the one hand, Judge Sykes is correct that taxpayer standing is exceptional, and any extension of it is in some tension with its exceptional quality . . . . But Judge Sykes' view of the need to confine taxpayer-plaintiffs to injunctive relief, because *Flast* and *Bowen* involved only such claims for relief, seems quite formalistic.").

263. *Cuno*, 126 S. Ct. at 1865.

264. *See* Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2568 (2007) (plurality opinion) ("[W]e have repeatedly emphasized that the *Flast* exception has a 'narrow application in our precedent,' that only 'slightly lowered' the bar on taxpayer standing, and that must be applied with 'rigor.' It is significant that, in the four decades since its creation, the *Flast* exception has largely been confined to its facts.") (citations omitted).

Court. In *Laskowski*, for example, the plaintiffs originally filed a complaint against the DOE, an Executive agency, seeking declaratory and injunctive relief.[265] Once the grant expired and the claim for injunctive relief became moot, the plaintiffs amended their complaint, seeking a court order forcing the DOE to recoup the funds.[266] The Seventh Circuit properly held that this remedy was not within the court's power because the decision to not recoup the funds is "within the absolute discretion of the enforcement agency."[267] If Notre Dame had not intervened as a defendant in the suit, the entire case would have been moot because the court cannot order the governmental agency to recoup the funds.[268] In future cases, when plaintiffs file an action against a governmental agency, they might be able to join as a party the grantee of the funds using Rule 19 of the Federal Rules of Civil Procedure, which concerns parties indispensable to the action.[269] But the joined grantee will not be a constitutional wrongdoer if it has merely relied on a seemingly constitutional grant.[270]

In regular taxpayer suits, the alleged constitutional wrongdoer is the governmental entity that violated the Establishment Clause by using the taxing and spending power in some improper way. But when a claim against the Government for injunctive relief is moot, as in *Laskowski*, there is no longer a live controversy against that governmental entity, because there is no remedy that can be ordered against it, and the taxpayer standing has thus expired. According to *Laskowski*, though, this "dead" claim is kept alive by the prospect of a recoupment order against the organization that received the funds, but has committed no constitutional wrong itself.[271]

As Judge Sykes pointed out, "[t]he majority . . . does not explain how the putative availability of restitutionary relief against a private party

265. *See supra* Part III.

266. *See supra* Part III.A.

267. Laskowski v. Spellings, 443 F.3d 930, 934 (7th Cir. 2006), *vacated and remanded sub nom.* Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007).

268. *See id.* at 941 n.1 (Sykes, J., dissenting) ("When Notre Dame intervened to protect its interest in the ongoing grant, the plaintiffs did not seek *any* form of relief against Notre Dame. When the grant expired, raising the mootness question, the plaintiffs argued only that they are entitled to an injunction ordering the Secretary to seek recoupment of the grant . . . .").

269. *See* FED. R. CIV. P. 19.

270. Under the First Amendment, state and federal governments may not make an establishment of religion or abridge individuals' free exercise of religion. *See* U.S. CONST. amend. I. By definition, then, only the government can violate the Establishment Clause—not a private individual or organization. *See Laskowski*, 443 F.3d at 934 ("Notre Dame objects that as a private entity it is incapable of violating the establishment clause, which like most provisions of the Constitution is a limitation on the power of government, not of private entities.").

271. *See supra* Part III.B. In its Petition for Writ of Certiorari, Notre Dame noted the irony in the Seventh Circuit's holding, which requires that "*Notre Dame*, a private actor incapable of committing the constitutional wrong [is enjoined] to *provide* money to the alleged constitutional wrongdoer." Petition for Writ of Certiorari, *supra* note 222, at 11–12.

intervening defendant can supply standing in a taxpayer suit under *Flast* when the entire case against the government's representative is moot."[272] If plaintiffs have no live controversy against the Government, the Government should no longer be a party to the action. But if the Government is dismissed from the suit, the only defendant is the grantee, who has done no wrong. This reasoning stands even if the grantee defendant did not intervene in the suit, but was joined as an "indispensable party." The recoupment remedy results in a strange structural phenomenon where the plaintiff lacks any remedy against one defendant (the wrongdoer), but may assert a remedy against the other defendant (who has done no wrong).

In *Arizonans for Official English v. Arizona*, the Supreme Court highlighted the absurdity of a similarly structured lawsuit.[273] In that case, the Ninth Circuit held that the Arizona Attorney General, who had been dismissed from the suit at the district court level as an improper party, could not re-enter as a party on appeal; however, the Attorney General *was* permitted to present arguments to the court regarding the constitutionality of the Arizona statute at issue.[274] Although the suit was originally against various representatives of the State of Arizona, those representatives had not appealed the district court's adverse ruling; thus "the appeal became one to which neither '[the] State [n]or any agency, officer, or employee thereof [was] a party . . . ."[275] The lower court had found the statute unconstitutional, and awarded the plaintiff nominal damages (which, as in *Laskowski*, were tacked onto her mooted claim for injunctive relief, in order to prevent dismissal of the suit).[276] The Supreme Court noted that "[t]he Ninth Circuit did not explain how it arrived at the conclusion that an intervenor the court had designated a nonparty could be subject, nevertheless, to an obligation to pay damages."[277] The Ninth Circuit failed to "home in on the federal courts' lack of authority to act in friendly or feigned proceedings."[278]

Similarly, in recoupment suits such as *Laskowski*, neither of the defendants are proper parties before the court. The plaintiffs have no legitimate claim against the recipient of the grant funds, who has committed no wrong. The plaintiffs have no remedy against the Government, which

272. *Laskowski*, 443 F.3d at 943 (Sykes, J., dissenting).
273. *See* Arizonans for Official English v. Arizona, 520 U.S. 43, 69–72 (1997).
274. *See id.* at 58.
275. *See id.* at 59.
276. *See id.* at 62, 68.
277. *See id.* at 70.
278. *See id.* at 71.

has allegedly violated the Establishment Clause. Allowing a claim for recoupment to keep a mooted case in federal court results in a "feigned proceeding," where there is no "genuine adversary issue between the parties,"[279] and over which the courts do not legitimately have jurisdiction.

The structure of such a suit somewhat resembles an action by a third-party beneficiary on a contract. The government explained that in *Laskowski*, "[t]he challenge . . . [was] not to the constitutionality of the congressional funding program, but [was] actually a dispute over whether the private party reasonably complied with the terms of the grant."[280] If the issue is really whether the grantee has complied with the conditions on the grant money, then the case is similar to a breach of contract between the government and the grantee. Although both the government and the grantee maintain that there has been no breach, the plaintiff taxpayers are like third-party beneficiaries, suing to force the parties to comply with the terms of the contract. The case, then, is not "like a case of money received by mistake and ordered to be returned to the rightful owner," as Judge Posner classifies it (because the taxpayers are not the rightful owner of the money), but is like a breach of contract.[281] However, the Supreme Court has held that private citizens do not have "third party beneficiary" status to bring actions forcing the government to comply with the law, even though such individuals are arguably "beneficiaries" of the country's laws.[282]

Judge Sykes correctly recognized that the recoupment remedy, as allowed in *Laskowski* "vest[s] taxpayers with a unique sort of qui tam-like authority to sue private parties for reimbursement of the Treasury . . . ."[283] In a qui tam suit, the government grants standing to an individual to enforce the government's own right of action.[284] Here, the government, as grantor

279. *See* United States v. Johnson, 319 U.S. 302, 304 (1943) (per curiam).

280. *See* Brief for the Federal Respondent at 12, Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007) (No. 06-582), *available at* http://www.usdoj.gov/osg/briefs/2006/0responses/2006-0582.resp.pdf.

281. Laskowski v. Spellings, 443 F.3d 930, 934–35 (7th Cir. 2006), *vacated and remanded sub nom.* Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007).

282. *See, e.g.*, Frothingham v. Mellon, 262 U.S. 447, 487 (1923) ("The administration of any statute . . . is essentially a matter of public and not of individual concern. If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same . . . . The bare suggestion of such a result . . . goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained."); Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 482–83 (1982) ("This Court repeatedly has rejected claims of standing predicated on 'the right, possessed by every citizen, to require that the Government be administered according to law . . . .'" (quoting Baker v. Carr, 369 U.S. 186, 208 (1962))).

283. *Laskowski*, 443 F.3d at 939 (Sykes, J., dissenting).

284. *See* 31 U.S.C.A. § 3730(b)(1) (2007) ("A person may bring a civil action for a violation of [the False Claims Act] for the person and for the United States Government. The action shall be brought in the name of the Government."); *see also* United States *ex rel.* Hall v. Tribal Dev. Corp., 49 F.3d 1208, 1213 (7th Cir. 1994) ("Once we accept the premise that the United States is the real plaintiff in a *qui tam* action, it stands to reason that challenges to the standing of the government's

of the funds, has a statutory right to order recoupment from a grantee, if the grantee does not comply with the terms of the grant.[285] The government has not conferred qui tam authority on private citizens to recoup funds allegedly spent in violation of the Establishment Clause. There is no taxpayer standing to act as "private attorneys general," searching for violations to prosecute on behalf of the government.[286]

As the Supreme Court noted in *Valley Forge*, a taxpayer's "claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court."[287] In the end, the Seventh Circuit's remedy forces an awkward arrangement between the parties where a plaintiff is suing two defendants, seeking an order that one defendant pay the other defendant a sum of money. If there truly was an Establishment Clause violation, it would be in the government's interest to recoup the funds, resulting in an alignment between the plaintiff's and the governmental defendant's interests. Such an arrangement is unprecedented.

H. Separation of Powers Concerns

In *Cuno*, the Supreme Court re-emphasized that "the case-or-controversy limitation is crucial in maintaining the 'tripartite allocation of power' set forth in the Constitution."[288] If there is no standing, and a case is moot, the courts exceed their authority by authorizing an action that is not a live case or controversy.[289] *Laskowski*'s recoupment remedy allows the

representative are beside the point.").

285. *See* 34 C.F.R. § 74.72(a) (2007) ("The closeout of an award does not affect any of the following: (1) The right of the Secretary to disallow costs and recover funds on the basis of a later audit or other review. (2) The obligation of the recipient to return any funds due as a result of later refunds, corrections, or other transactions."). Here, the DOE undertook its own independent review of Notre Dame's use of the grant funds, and found no violations of the grant terms. According to this statute, it is completely within the department Secretary's discretion to decide whether or not recoupment of funds is necessary for noncompliance.

286. *See* Brief for the Federal Respondent, *supra* note 280, at 15; *see also* Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2559 (2007) (plurality opinion) ("[I]f every federal taxpayer could sue to challenge any Government expenditure, the federal courts would cease to function as courts of law and would be cast in the role of general complaint bureaus.").

287. *Valley Forge*, 454 U.S. at 487.

288. DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854, 1861 (2006) (quoting *Valley Forge*, 454 U.S. at 474); *see also Valley Forge*, 454 U.S. at 471 ("The judicial power of the United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts.").

289. For example, in *Lujan v. Defenders of Wildlife* the Court noted:

[T]he Constitution's central mechanism of separation of powers depends largely upon

Judicial Branch to impermissibly intrude into the province of the Executive Branch by challenging the Executive's choice to not recoup the grant funds.[290]

The *Laskowski* majority correctly held that the decision whether to seek repayment of grant funds was "within the absolute discretion of the enforcement agency,"[291] and that the courts "are not authorized to review a decision not to take an enforcement action."[292] However, the court then went on to do just that: although the DOE had conducted an independent investigation and in its discretion found no constitutional violation, the court remanded the case to be tried on the merits, with the possibility of a

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> common understanding of what activities are appropriate to legislatures, to executives, and to courts. . . . One of those landmarks, setting apart the "Cases" and "Controversies" that are of the justiciable sort referred to in Article III—"serv[ing] to identify those disputes which are appropriately resolved through the judicial process"—is the doctrine of standing. Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.

504 U.S. 555, 559–60 (1992) (internal citation omitted). The Court then held that the plaintiffs (environmental groups) lacked standing to challenge the Secretary of the Interior's regulation regarding the Endangered Species Act because the plaintiffs did not satisfy the standing requirements of injury and redressability. *See id.* at 568. The Court concluded:

> We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.

Id. at 573–74.

290. Indeed, "[t]he courts must be reluctant to expand their authority by requiring intrusive and unremitting judicial management of the way the Executive Branch performs its duties." *Hein*, 127 S. Ct. at 2573 (Kennedy, J., concurring). Here, statutory authority was given to the Secretary of Education to collect any funds misspent by the grantee. *See supra* note 146. It would be improper to allow taxpayers to bring a suit against the private parties who received the government funds, where Congress has delegated this remedy to the Executive Branch. *See, e.g.*, Schweiker v. Chilicky, 487 U.S. 412, 429 (1988) (refusing to imply a private remedy for damages arising out of denial of disability benefits alleged to be in violation of Due Process); Bush v. Lucas, 462 U.S. 367, 368 (1983) (refusing to imply a private remedy for damages arising out of the alleged denial of free speech rights in employment relationship, where there are in place comprehensive procedural and substantive provisions). "The Court should not authorize the constant intrusion upon the executive realm that would result from granting taxpayer standing" in cases such as *Laskowski*. *See Hein*, 127 S. Ct. at 2573 (Kennedy, J., concurring).

291. Laskowski v. Spellings, 443 F.3d 930, 934 (7th Cir. 2006), *vacated and remanded sub nom.* Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007).

292. *Id.* (citing Heckler v. Chaney, 470 U.S. 821, 831–33 (1985)). *Heckler v. Chaney* held that an agency's refusal to seek a remedy from a private party

> shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to "take Care that the Laws be faithfully executed."

470 U.S. at 831–32; *see also* United States v. Standard Oil Co., 332 U.S. 301, 314–15 (1947) (The judiciary should not override the political branches' decisions on how to best "secur[e] the treasury or the government against financial losses . . . including requiring reimbursement for injuries . . . .").

recoupment order against the grantee, Notre Dame.[293] By merely switching the court's "order" to the grantee instead of the government, the Court indirectly authorized a remedy against the Executive agency which the law does not allow the court to exercise directly.

The *Laskowski* majority held that a court does not have the power to order an Executive agency to recoup the funds, because "[o]therwise courts would take over the prosecutorial function, making decisions, well outside judicial competence, about the best allocation of limited enforcement resources."[294] However, Judge Posner does not go on to explain how the court's ordering the grantee to give the money back is any different from the court's ordering the Executive agency to collect the funds.[295] That is because there is no difference—either way the court intrudes upon the Executive's authority to manage its own affairs.

The United States government has argued that *Laskowski*'s recoupment remedy violates separation of powers principles,[296] claiming that "a decision to seek the severe remedy of recoupment in this context is particularly suited to the exclusive discretion of the government . . . ."[297] Courts may fail to realize that even where there has been a constitutional violation, the grantee has likely provided valuable goods or services to the government. Although some funds may have impermissibly aided religion, that does not mean that an entire grant did so. For example, in *Prison Fellowship Ministries*, the district court judge ordered PFM to return to the government the *entire* amount of *all* previous grants.[298] Such an order is vastly inequitable, considering that for a period of eight years PFM provided rehabilitative services to the Iowa prison system.[299] The United States correctly asserts that the agencies which were involved in the contracting are in the better

293. *Laskowski*, 443 F.3d at 937.

294. *Id.* at 934.

295. The opinion cursorily states that the difference between the two court orders "has no practical significance." *Id.* at 935.

296. *See* Brief for the United States as Amicus Curiae Supporting Appellants, *supra* note 83, at 6 (noting that the recoupment remedy "contravenes the principle, grounded in separation of powers and federalism, that courts lack authority to determine whether reimbursement from private parties is an appropriate remedy to protect the public fisc").

297. *Id.* at 5. *But see* Respondent's Brief in Opposition to Petition for Writ of Certiorari, *supra* note 239, at 11 ("[I]t is up to the courts, not the DOE, to decide whether the DOE has violated the Establishment Clause and, if so, to order an appropriate remedy.").

298. *See* Ams. United for Separation of Church & State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862, 941 (S.D. Iowa 2006), *judgment aff'd in part and rev'd in part*, 509 F.3d 406 (8th Cir. 2007); *see also supra* Part IV.

299. *See Prison Fellowship Ministries*, 432 F. Supp. 2d at 941.

position to determine the amount of money that should be recouped (if any) than the courts are.[300]

If allowing the courts to make this decision violates the separation of powers as laid out in the Constitution, plaintiffs should not have standing in these cases, but should seek a redress of their injury through other forums, such as the political process.[301] The Supreme Court has explained:

> In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process . . . . [T]hat the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the 'ground rules' established by the Congress for reporting expenditures of the Executive Branch. Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls. Slow, cumbersome, and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them.[302]

Indeed, government officials have an independent duty to obey the Constitution, regardless of whether their actions are challengeable by individuals in the federal courts.[303]

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300. *See* Brief for the United States as Amicus Curiae Supporting Appellants, *supra* note 83, at 5 ("Moreover, recoupment typically fails to take into account that a contractor or grant recipient may have provided valuable services to the government wholly apart from the Establishment Clause violation. It is for that reason that a decision to seek the severe remedy of recoupment in this context is particularly suited to the exclusive discretion of the government, since the government will be in the best position to determine the value of the services it received.").

301. *See* Frothingham v. Mellon, 262 U.S. 447, 488–89 (1923) (refusing to hear plaintiffs' complaint that an act of Congress was unconstitutional, because "[t]o do so would be, not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and coequal department, an authority which plainly we do not possess."). For example, then: if individuals do not believe FBOs should receive government funding, or that there should be stricter rules on the use of government funds, they should elect Congresswomen and Congressmen who will vote against such appropriations.

302. United States v. Richardson, 418 U.S. 166, 179 (1974) (holding that taxpayer lacked standing to bring mandamus action compelling the Secretary of the Treasury to publish an accounting of the receipts and expenditures of the CIA and to enjoin any further publication of a consolidated statement which did not reflect them).

303. *See* Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2573 (2007) (Kennedy, J., concurring) ("It must be remembered that, even where parties have no standing to sue, members of the Legislative and Executive Branches are not excused from making constitutional determinations in the regular course of their duties. Government officials must make a conscious decision to obey

VI. EQUITABLE RESTITUTION AS A CONSTITUTIONAL REMEDY

Flast v. Cohen provides that "because 'the Establishment Clause . . . specifically limit[s] the taxing and spending power conferred by Art. I, § 8,' 'a taxpayer will have standing consistent with Article III *to invoke federal judicial power* when he alleges that congressional action under the taxing and spending clause is in derogation of' the Establishment Clause."[304] This means that in a taxpayer standing suit, the plaintiffs still must invoke a remedy that is within "federal judicial power." Judge Sykes correctly maintains that restitution, as "a private law equitable doctrine that orders liability and remedies between private individuals based on unjust enrichment," is not proper in the public law context.[305] For her, "adapting the common law doctrine of restitution to fashion a remedy in a taxpayer suit for an alleged Establishment Clause violation is like trying to pound the proverbial square peg into a round hole."[306] Restitutionary recoupment on behalf of taxpayers simply does not fit into the context of grants between the government and private actors.

A. The Scope of Equitable Restitution

Restitution can be either *substantive*, where the only source of liability is the defendant's unjust enrichment,[307] or *remedial*, where the defendant's liability is based in tort or breach of contract and restitution is a type of remedy which may be ordered.[308] Here, Judge Posner reasoned that

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the Constitution whether or not their acts can be challenged in a court of law and then must conform their actions to these principled determinations.").

304. DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854, 1864 (2006) (emphasis added) (alterations in original) (quoting Flast v. Cohen, 392 U.S. 83, 105–06 (1968)).

305. Laskowski v. Spellings, 443 F.3d 930, 941 (2006) (Sykes, J., dissenting), *vacated and remanded sub nom.* Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007).

306. *Id.*

307. *See* DOBBS, *supra* note 81, § 4.1(1), at 552 ("The substantive question is whether the plaintiff has a right at all, that is, whether the defendant is unjustly enriched by legal standards."); Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1285 (1989) ("Whenever liability depends on a finding of unjust enrichment, the law of restitution is substantive as distinguished from remedial. The focus of inquiry is on the meaning of 'unjust.' What is it that makes enrichment unjust in the absence of some wrong for which the law would impose damage liability?"). Unjust enrichment "refers to corrective justice," and is "about what is right between two particular people, considering 'equity and good conscience' or by the ties of natural justice." DOBBS, *supra* note 81, § 4.1(2), at 558 (footnote omitted).

308. *See* DOBBS, *supra* note 81, § 4.1(1), at 552 ("The remedial question is concerned first with whether, among the remedies possible, restitution is an appropriate or the most appropriate choice, Second . . . the remedial question is concerned with the appropriate measure or form of

restitutionary recoupment "would be like a case of money received by mistake and ordered to be returned to the rightful owner."[309] In such cases of mistake, the restitution is substantive because restitution is the only basis of liability; the plaintiff has conferred a benefit on the defendant, but the defendant has not engaged in any wrongdoing.[310] Thus, the analogy here is that the plaintiff taxpayers have mistakenly conferred a benefit on the defendant Notre Dame, and that Notre Dame should return the funds to the U.S. Treasury in order to rectify the mistake.[311]

However, the argument that the taxpayer plaintiffs have conferred a benefit upon Notre Dame cannot stand.[312] According to the Supreme Court's taxpayer standing precedent, plaintiffs do not have an interest in the Federal Treasury merely because they contribute to it by paying taxes.[313]

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restitution."); Laycock, *supra* note 307, at 1286 ("[I]t is only the tort or breach of contract that makes the enrichment unjust . . . . [R]estitution is remedial. Defendant's enrichment is now generally recognized as simply an alternate measure of recovery for the underlying wrong.").

309. *Laskowski*, 443 F.3d at 934–35.

310. *See* Laycock, *supra* note 307, at 1284 ("Defendant may be unjustly enriched without having committed any other civil wrong. Defendant may be enriched by mistake, as in cases of mistaken payments or mistaken improvements."). Dobbs explains the cases where benefits are received by a defendant without misconduct as substantive restitution:

> Not all unjust enrichment turns on tort, on tangible property, or on contract breach. Sometimes a plaintiff confers a benefit upon a defendant wholly apart from any breach of substantive duty . . . . What is essential is that the defendant receives a benefit without fault or breach of duty on his part, yet is at least arguably under a duty to give up that benefit on the ground that otherwise he will be unjustly enriched . . . . [W]hen unjust enrichment provides the *only* ground for any recovery at all . . . the substantive issue [is] whether enrichment can be described as unjust.

See DOBBS, *supra* note 81, § 4.1(2), at 559–61.

311. *See Laskowski*, 443 F.3d at 934–35; *id.* at 944 (Sykes, J., dissenting) ("As applied to a private party defendant in a *Flast* taxpayer lawsuit, restitution could be classified only as a substantive claim for relief, not merely a type of remedy. Because a private party cannot violate the Establishment Clause, unjust enrichment would be the only source of the private party's liability in this context.").

312. It is clear that Congress and the DOE have conferred a benefit on Notre Dame by dispersing funds to Notre Dame for the ACE program. However, the DOE is not seeking restitution of the benefit conferred, but the taxpayer plaintiffs are. As will be shown, however, once the plaintiffs have paid their tax money into the Federal Treasury, they no longer have any control over the funds. The funds then belong to the federal government to dispense with as it pleases. *See Laskowski*, 443 F.3d at 944 (Sykes, J., dissenting) ("Because a private party cannot violate the Establishment Clause, unjust enrichment would be the only source of the private party's liability in this context. But a federal taxpayer does not by paying his taxes confer a benefit on a federal grant recipient in any meaningful sense . . . .").

313. *See* Frothingham v. Mellon, 262 U.S. 447, 487 (1923) (holding that a federal taxpayer's "interest in the moneys of the Treasury . . . is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity."); *see also* Ala. Power Co. v. Ickes, 302 U.S. 464, 478 (1938) (holding that "the interest of a taxpayer in the moneys of the federal treasury furnishes no basis" to argue that a federal agency's loan practices are unconstitutional); Doremus v. Bd. of Educ., 342 U.S. 429, 433 (1952) ("[T]he interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain and indirect" to support standing to challenge "their manner of expenditure."); DaimlerChrysler v.

The recent case of *DaimlerChrysler Corp. v. Cuno*[314] is instructive on this point. In *Cuno*, state taxpayers filed suit challenging local property tax abatements and investment tax credits granted to automobile manufacturers to induce them to remain in the city, as violative of the Commerce Clause.[315] The Court held, however, that the plaintiffs lacked standing as taxpayers because:

> A taxpayer-plaintiff has no right to insist that the government dispose of any increased revenue it might experience as a result of his suit by decreasing his tax liability or bolstering programs that benefit him. To the contrary, the decision of how to allocate any such savings is the very epitome of a policy judgment committed to the "broad and legitimate discretion" of lawmakers, which "the courts cannot presume either to control or to predict."[316]

Therefore, the taxpayers did not have a sufficient interest in the Treasury to challenge the government's use of the tax money.[317]

The situation here is not any different, even though the Establishment Clause is implicated. In creating an exception to the no-taxpayer-standing rule, *Flast* did not say that in Establishment Clause challenges the plaintiffs have an individual interest in the Federal Treasury.[318] As the Supreme Court recently recognized:

> *Flast* is consistent with the principle, underlying the Article III prohibition on taxpayer suits, that a litigant may not assume a particular disposition of government funds in establishing standing . . . . The Court [in *Flast*] . . . understood the "injury" alleged in Establishment Clause challenges to federal spending to be

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Cuno, 126 S. Ct. 1854, 1862 (2006) (In cases where "the alleged injury is based on the asserted effect of the allegedly illegal activity on public revenues, to which the taxpayer contributes . . . the alleged injury is not 'concrete and particularized,' but instead a grievance the taxpayer 'suffers in some indefinite way in common with people generally.'") (citations omitted).

314. 126 S. Ct. at 1854.

315. *See id.* at 1859. The Commerce Clause provides that Congress shall have power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. The plaintiffs claimed standing "by virtue of their status as Ohio taxpayers, alleging that the franchise tax credit 'depletes the funds of the State of Ohio to which the Plaintiffs contribute through their tax payments' and thus 'diminish[es] the total funds available for lawful uses and impos[es] disproportionate burdens on' them." *Cuno*, 126 S. Ct. at 1862.

316. *Id.* at 1863 (quoting ASARCO Inc. v. Kadish, 490 U.S. 605, 615 (1989)).

317. *Id.* at 1864.

318. *Id.* at 1864–65.

> the very "extract[ion] and spen[ding]" of "tax money" in aid of religion alleged by a plaintiff. And an injunction against the spending would of course redress *that* injury, regardless of whether lawmakers would dispose of the savings in a way that would benefit the taxpayer-plaintiffs personally.[319]

In cases brought under *Flast*, then, the theory is not that the taxpayers have personally conferred a benefit on the grantee of the funds through paying taxes, but that the government has spent tax money impermissibly in aid of religion. The injury (violation of the Establishment Clause) is redressed because the government is *enjoined* from committing further violations, *not* because the plaintiffs' tax money is being saved. Because plaintiffs never have a personal interest in the Federal Treasury, Judge Posner's "money by mistake" analogy cannot stand.[320] As Judge Sykes recognized in dissent, "the connection between an individual citizen's tax payment and any given federal grant recipient is nonexistent, or at least far too attenuated to support an unjust enrichment cause of action . . . ."[321] Thus, "this is not at all 'like a case of money received by mistake and ordered to be returned to the rightful owner.'"[322]

B. Equitable and Practical Considerations of Laskowski*'s Holding*

Finally, it is clear that if the Seventh Circuit's recoupment remedy is allowed to stand, it will work harsh injustice against the charitable organizations and schools that rely on government grants that appear to be constitutional when they are made. If the recoupment remedy is made readily available, "[t]he risk of being the center of a lawsuit for a grant received and spent *years earlier* will prove too much to bear for many [faith-based organizations] that will simply choose to forgo government funding."[323] In essence, any potential grantees of government funds will not be able to trust that the funds they receive are legitimate. Not only will grantees lose the funds that they have already spent in providing services to the community, but they also might have to spend countless time, energy, and money defending costly lawsuits.[324]

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319. *Id.* at 1865 (citations omitted).

320. *See supra* note 169 and accompanying text.

321. Laskowski v. Spellings, 443 F.3d 930, 944 (7th Cir. 2006) (Sykes, J., dissenting), *vacated and remanded sub nom.* Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007).

322. *Id.* (quoting *Id.* at 934–35).

323. Brief of Amici Curiae We Care America et al. in Support of Petitioner at 3, University of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007) (No. 06-582), 2006 WL 3449038 (emphasis added) [hereinafter Brief of Amici Curiae We Care America].

324. *See id.*

Although the Seventh Circuit opinion leaves room for a defense of "reliance," it is clear from *Prison Fellowship Ministries* that even when the grantee has relied on the funds, the court may impose such a strict "reasonableness" standard that the grantee will lose the case.[325] The recoupment remedy effectively "leaves [faith-based organizations] in a very untenable position by requiring them to be able to accurately discern when the government is violating the Establishment Clause."[326] Members of the Supreme Court, however, have recognized that "in respect to the First Amendment's Religion Clauses . . . there is 'no simple and clear measure which by precise application can readily and invariably demark the permissible from the impermissible.'"[327] If Supreme Court Justices cannot agree on the lines of demarcation between permissible and impermissible interactions between government and religion, it is entirely unreasonable to expect private citizens to be able to accurately do so. In the end, to require grantees "to accurately discern constitutional wrongdoing in such a fact-specific and fluctuating area of law is neither reasonable nor workable."[328]

Charitable organizations provide many services in our communities, which the government is unable to provide on its own. These organizations rely on government funding for at least part of their expenditures, but the threat of costly litigation and returning the funds will have the chilling effect of forcing these groups to say no to the government money.[329] Allowing taxpayers to challenge funds long ago spent will not only hurt the

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325. *See supra* Part IV.

326. *See* Brief of Amici Curiae We Care America, *supra* note 323, at 3. It is entirely reasonable for these organizations to rely on the government to structure grants and contracts in a constitutional manner. It is the government's duty, and not the grantee's duty, to ensure that there is no constitutional problem with the granting scheme.

327. Van Orden v. Perry, 545 U.S. 677, 698 (2005) (Breyer, J., concurring in judgment) (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring)). Even Judge Posner has extrajudicially recognized the ambiguity of Establishment Clause precedent, noting:

> Almost all establishment-clause cases involve efforts to 'establish' religion in general (versus nonbelief). . . . These efforts take such forms as making time for voluntary prayer in public schools, encouraging public school instruction in 'intelligent design,' *providing public funds for secular education in religious (mainly Catholic) schools* or for the display of the creche during Christmas, or, as in the two recent cases, displaying religious materials on public property, usually without cost to the public . . . .
>
> Some of these efforts are held to violate the establishment clause, others not; *there is no discernible pattern or crisp legal standard.*

Posting of Richard Posner to The Becker-Posner Blog, http://www.becker-posner-blog.com/archives/2005/08/the_ten_command.html (Aug. 15, 2005, 13:08 EST) (emphasis added).

328. Brief of Amici Curiae We Care America, *supra* note 323, at 3.

329. *See id.* at 3, 5–6.

organizations that relied on those funds, but also will hurt the community and the government. Those who currently benefit from programs run by faith-based organizations will suffer if such organizations are forced to forego government funding in fear of having to defend litigation.

On the other hand, as citizens of the United States, we all benefit when the government does not violate the Constitution. Thus, disallowing taxpayer standing when important allegations such as religious rights are concerned seems unfair and dangerous. However, this is not a reason for courts to exceed their Article III power by hearing cases that are moot and for which the plaintiffs do not have standing. In *Valley Forge*, the Supreme Court noted that "'[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.'"[330] Although the *Valley Forge* plaintiffs alleged an important violation—that the government freely gave property to a sectarian school in violation of the Establishment Clause—the Court still declined to hear the case, because doing so was outside the scope of its authority. Similarly here, plaintiffs challenging government grants are seeking to enforce important constitutional guarantees. However, when the plaintiffs are not the proper parties to bring such a suit, or when a suit has become moot, the Supreme Court has recognized that no matter how important the issue, it does not have authority to hear such cases.

VII. CONCLUSION

As the story of the law student at the beginning of this article illustrated, the recoupment remedy does not make sense. Supreme Court precedent and our nation's history make it clear that the separation of powers—including the duty of the Judiciary to stay within the bounds of the powers granted to it—is an essential safeguard of our system of government. It would be entirely improper for the courts to begin granting standing to any and all

330. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 489 (1982) (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974)). The Sixth Circuit recently reiterated this point, when holding that plaintiffs did not have standing to challenge President Bush's "Terrorist Surveillance Program," which allegedly authorized warrantless wiretapping. *See* ACLU v. Nat'l Sec. Agency, 493 F.3d 644, 648 (6th Cir. 2007). In that case, the district court stated that if it "were to deny standing . . . the President's actions in warrantless wiretapping, in contravention of FISA, Title III, and the First and Fourth Amendments, would be immunized from judicial scrutiny. It was never the intent of the Framers to give the President such unfettered control . . . ." ACLU v. Nat'l Sec. Agency, 438 F. Supp. 2d 754, 771 (E.D. Mich. 2006). The Sixth Circuit, however, rejected this argument. Ironically, the *ACLU* plaintiffs challenged the President's actions as outside the scope of his executive authority, while the Sixth Circuit noted that "this court, not unlike the President, has constitutional limits of its own and, despite the important national interests at stake, cannot exceed its allotted authority." *ACLU*, 493 F.3d at 676. The court concluded that "[i]t would ill behoove us to exceed our authority in order to condemn the President or Congress for exceeding theirs." *Id.*

plaintiffs or to begin hearing moot cases because they involve interesting or important questions of law. The Executive Branch has the necessary authority to ensure that grant funds are not being used impermissibly in support of religion. Although citizens have concerns that the government not violate the provisions of the Constitution, "[t]he checks and balances of the ballot box are an effective disincentive" to prevent the Executive Branch from failing to carry out its constitutional duty to ensure the funds it grants are not improperly spent.[331]

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331. Laskowski v. Spellings, 443 F.3d 930, 946 (7th Cir. 2006) (Sykes, J., dissenting), *vacated and remanded sub nom.* Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007).

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